Chicago Tribune Company *and* Chicago Web Printing Pressmen's Union No. 7, Graphic Communications International Union, AFL–CIO. Cases 13–CA–25535, 13–CA–25802, 13–CA–25906, 13–CA–25921, and 13–CA–26131

August 31, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On December 12, 1989, Administrative Law Judge Marian C. Ladwig issued the original decision in this case. On August 23, 1991, the Board issued a Decision and Order[1] reversing the judge's ruling striking the Respondent's affirmative defenses and remanding this proceeding for a supplemental decision on the merits of those defenses and to explain the judge's findings that striker replacements hired by the Respondent after August 19, 1985, were permanent, rather than temporary.[2]

On October 26, 1992, Judge Ladwig issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and renewed its request for oral argument. The General Counsel filed exceptions and a supporting brief, and a brief answering the Respondent's exceptions. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's and Charging Party's exceptions.[3] The General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, supplemental decision, and the record in light of the exceptions and briefs,[4] and for the reasons set forth below, has decided to affirm the judge's rulings,[5] findings,[6] and conclusions[7] only to the extent consistent with this Supplemental Decision and Order.

I. OVERVIEW OF COMPLAINT ALLEGATIONS AND AFFIRMATIVE DEFENSES

This proceeding presents numerous unfair labor practice issues that arose during lengthy contract negotiations and an attendant strike. The amended complaint in Case 13–CA–25535 alleges that the Respondent: (1) violated Section 8(a)(5) by insisting to impasse on November 13, 1985, on a permissive subject of bargaining—an interpretation of a zipper clause that would change the description of the bargaining unit—and thereby converted the July 18, 1985 economic strike to an unfair labor practice strike; (2) violated Section 8(a)(3) by refusing to reinstate unfair labor practice strikers and displace 74 replacements hired after November 13, 1985, and before receipt of the Union's January 30, 1986 unconditional offer to return to work; and (3) violated Section 8(a)(3) by failing to reinstate former economic strikers to vacancies existing after November 4, 1986, the date 6 months before the May 4, 1987 filing of an amended charge in Case 13–CA–25535.[8] The complaint in 13–CA–25535 was further amended at trial in October 1988 to allege that the

[1] 304 NLRB 259.

[2] The Board's remand order granted the General Counsel's motion to strike certain of the Respondent's references to evidence outside the record, denied motions to censure the Respondent, deferred to the judge the Respondent's motion to reopen the record, and denied the Respondent's request for oral argument.

[3] The Respondent's answering brief was originally rejected as untimely. Thereafter, the Respondent filed a motion to file its answering brief out-of-time. Both the General Counsel and the Charging Party filed opposition to the Respondent's motion. By order dated February 19, 1993, the Board granted the Respondent's motion.

[4] We deny the Respondent's renewed request for oral argument as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[5] We affirm the judge's December 2, 1991 ruling on the Respondent's April 26, 1990 motion to reopen the record. The judge granted the motion in part and denied it in all other respects. By motion filed on February 27, 1995, the Respondent again seeks to reopen the record. Exhibits 1, 2, and 3 of Respondent's latest motion represent the same January 1988 correspondence that Judge Ladwig's ruling allowed in the record. As noted, we affirm this ruling. In all other respects, we deny the Respondent's February 27, 1995 motion to reopen the record.

[6] The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[7] We adopt the judge's findings regarding the individual 8(a)(3) allegations concerning the discharges of strikers Ralph Fiore, William Carrington, and Arthur Vehlow for picket line misconduct.

[8] The 8(a)(3) allegations have a complicated procedural history. On March 21, 1986, the Union filed a charge in Case 13–CA–25791 alleging that the Respondent had unlawfully failed to reinstate strikers after January 30, 1986. The Region dismissed this charge. The Office of Appeals upheld the dismissal. On May 4, 1987, the Union renewed this allegation as an amendment to the charge in Case 13–CA–25535. On July 2, 1987, the complaint in that case was amended to allege various unlawful refusals to reinstate unfair labor practice strikers. At the commencement of the hearing on October 2, 1987, the General Counsel moved to amend the complaint further to allege that economic strikers had also been unlawfully denied reinstatement. The judge denied the motion. Following the General Counsel's special appeal, the Board by Order dated December 4, 1987, granted the motion to amend only with respect to violations alleged to have occurred after November 4, 1986, i.e., 6 months before the amendment to the charge.

Respondent violated Section 8(a)(5) on November 1, 1986, by posting and implementing changes in working conditions that differed from those proposed in its last offer to the Union and also without a lawful impasse.

Four other complaints were issued between March 25, 1986, and July 21, 1986. The complaint in Case 13–CA–25802 alleges that the Respondent paid nonstrikers and returning strikers wages that were not negotiated with the Union and that were not contained in the expired contract. The complaint in Case 13–CA–25906 alleges that the Respondent violated Section 8(a)(3) by discharging three striking employees for picket line misconduct. The complaint in Case 13–CA–25921 alleges that the Respondent violated Section 8(a)(5) by refusing to furnish the Union with the names and addresses of strike replacements and the number of supervisors who had performed bargaining unit work. The complaint in Case 13–CA–26231 alleges that the Respondent violated Section 8(a)(5) by refusing to furnish the Union with a weekly list of bargaining unit employees who had been terminated, including names, addresses, and reasons for termination. These complaints were consolidated with Case 13–CA–25535.

In its answers, the Respondent asserts that the July 18, 1985 strike was illegally based on three affirmative defenses previously alleged in 8(b)(3) unfair labor practice charges that were either withdrawn or dismissed. These defenses allege that, during the course of 59 bargaining sessions from February 1985 to November 1986, the Union: (1) unlawfully insisted to impasse on a permissive subject of bargaining—including supervisors in the bargaining unit; (2) unlawfully engaged in coordinated bargaining; and (3) unlawfully engaged in surface bargaining.

As noted, the Board's initial Decision reversed the judge's ruling and remanded this issue for, inter alia, a determination on the merits of these defenses. In his supplemental decision, the judge rejected each of the Respondent's affirmative defenses. We adopt the judge's findings rejecting these defenses. Accordingly, we find no illegal strike.

II. THE 8(A)(5) ALLEGATION THAT THE RESPONDENT INSISTED TO IMPASSE ON A PERMISSIVE SUBJECT OF BARGAINING—AN INTERPRETATION OF ITS ZIPPER CLAUSE THAT WOULD CHANGE THE SCOPE OF THE BARGAINING UNIT

A. *Factual Background*

In October 1982, the Respondent completed the move of its pressroom from the Tribune Tower on Michigan Avenue to the ''Freedom Center,'' a new production facility on Chicago Avenue. The new facility was equipped with state-of-the-art offset presses, replacing the old letterpress equipment.

The 1979–1985 collective bargaining agreement, expiring April 3, 1985,[9] was between the Union (Chicago Web Printing Pressmen's Union No. 7, GCIU, AFL-CIO) and the Chicago Newspaper Publishers' Association (CNPA), composed of the Respondent and the Chicago Sun-Times. Section 1 of this agreement provided:

> Section 1.(a) The Employer recognizes the Union as the exclusive collective bargaining agent for the employees engaged in the operation of the presses in the pressrooms of the Employer and such rewinding machines of the Employer as they are used for printing. The press room department shall be interpreted to mean the entire pressroom and not any portion of this department, and shall be understood to mean such as is made up of Union employees and in which the Union has been formally recognized by the Employer . . . .
>
> (b) It is mutually agreed that the above is defined to mean all work currently recognized between the parties as embracing the operation of all printing presses in the respective pressrooms of the Employer and shall be interpreted to include; [listed make- ready items 1-6].
>
> It is understood and agreed that any or all of the above work (items 1-6 inclusive) may be performed by machinists as part of a repair or overhaul. [1960 jurisdictional dispute resolution].
>
> It is further agreed that the above provisions shall apply to the present printing presses and pressrooms and all new printing presses and pressrooms of the Employer for the production of newspapers or associated parts thereof.
>
> (c) The Union shall have no control or jurisdiction over labor whose work is not in connection with the operation of the presses, such as janitors, watchmen, electricians or machinists.

Section 1(a), the unit description, had remained unchanged between the 1952 collective-bargaining agreement and the parties' 1979–1985 agreement: ''the employees engaged in the operation of the presses . . . .'' By contrast, section 1(b), the jurisdiction clause, was changed in 1960 because of a jurisdictional dispute between the Union and the Machinists over certain work in connection with operation of the presses. The words ''and shall be interpreted to include,'' followed by six enumerated (make-ready) work assignments, were added to section 1(b)'s definition of the Union's work assignment: ''all work currently recognized between the parties as embracing the operation of all printing presses.''

The 1979–1985 agreement contained a zipper clause which provided:

[9] All subsequent dates are in 1985 unless otherwise indicated.

> It is mutually agreed that the contract, the Job Security Lists, the letter from the Association to the Union dated February 29, 1980, and the Supplementary Agreement between the parties dated February 29, 1980 shall constitute the agreement between the parties.

An arbitration award, dated March 27 (the Fleischli Award), specifically held that this zipper clause did not preclude consideration of past practice. In addition, on June 18, 1981, during the term of the 1979–1985 contract, the Respondent, the Union, and the Stereotypers local executed a Memorandum of Understanding assigning the operation of a laser platemaking system to pressroom employees represented by the Union.

On January 3, the Union withdrew its consent to further multiemployer bargaining with the Respondent and the Chicago Sun-Times. At the initial separate bargaining session for a successor agreement with the Respondent on February 4, the Union proposed that section 1(b) include a new item 7 to show plateroom jurisdiction.[10] From February until October 24, when the Respondent fully explained its interpretation of its new proposed zipper clause (discussed below) as applied to section 1(b), the principal dispute about the unit-jurisdiction language in section 1 of the expired contract concerned whether the platemaking operations, also performed in the press department, should be added to section 1(b). At the July 26 poststrike negotiating meeting, the Company agreed to incorporate platemaking in its proposed section 1(b) as item 7.

On October 4, the Respondent proposed an agreement that contained, in all material respects, the above-quoted unit-jurisdiction language from sections 1(a) and 1(b) and incorporated platemaking item 7. It also included a new zipper clause proposal, which the Union interpreted as undoing the effect of the Fleischli award by precluding the use of past practice to prove jurisdictional claims. The new zipper clause proposal provided:

> This agreement, the Job Security List (attached) . . . and the Memorandum of Understanding . . . June 18, 1981, as amended, constitute the complete and total agreement between the Employer and the Union on all wages, hours, benefits and other working conditions, and, as such, supersedes any previous agreements or understandings or practices between the Employer and the Union whether written, oral or implied. Any such agreements, understandings or practices are hereby terminated as of the effective date of this contract. The application of this contract is limited to the employees and the Union as defined in this Contract.

[10] The plateroom is where journeymen pressmen make plates from negatives and install them in the presses.

At the October 24 negotiating session, when the Union was reaffirming its previous tentative agreement to sections 1(a) and 1(b) of the Respondent's October 4 proposed agreement, Respondent's spokesman, George Veon, interpreted the impact of the zipper clause. Under Veon's expressed interpretation, the Union's exclusive work jurisdiction was limited to make-ready work, items 1–6, plus the platemaking item 7, but not the majority of the presswork. This excluded that part of the reel room work performed in operating the presses, which had historically been assigned to the pressroom. According to Veon, that assignment had been solely at the Respondent's discretion.[11]

Veon said that the Union's exclusive work jurisdiction was specifically spelled out in section 1(b): ''All that it says specifically is what it means.'' When Union President Robert Hagstrom asked whether past practice meant anything, Veon said that past practice meant nothing and he stated that the Respondent would risk arbitration on items not listed. The Union informed the Company that under the proposed zipper clause there would be no past practice, and therefore nothing to arbitrate.

Hagstrom credibly testified that he was astounded by Veon's position. Hagstrom wrote ''No way'' in his bargaining notes. International Vice President Guy De Vito told Veon, ''We are not going to have [an] open-ended contract based on . . . your interpretation and your zipper clause.'' Veon indicated that the Respondent was comfortable with its proposal and negotiations proceeded on other issues.

At the next bargaining session on November 5, the Union proposed to amend section 1(b) to include a list of traditionally performed pressroom and reel room assignments. Veon rejected the Union's proposal and confirmed that the Respondent's section 1(b) proposal was limited by the zipper clause to items 1–7. Veon told De Vito, ''Contract means what it says. Past practices or understandings don't apply, contract language applies.''

At the next meeting on November 13, Veon presented the Respondent's ''firm and final'' offer, which retained the new zipper clause and unit-jurisdiction proposals as discussed on October 24. Veon reaffirmed that the Respondent's interpretation of the zipper

[11] The reel room is where the paper comes from through rollers. It is printed simultaneously on both sides and offset. The journeymen pressmen were responsible for operation of the rolls in the reel room at the time of the strike. Labor Relations Manager Howe testified that employees represented by the Union worked in the reel room and the pressroom on the presses. The Paperhandlers, however, also represented certain reel room employees. Company attorney and bargaining committee member James Kulas testified that under the Respondent's proposal the pressmen's reel room work was not the Union's ''exclusive contractual jurisdiction,'' and if the Company chose it could reassign that work to members of the Paperhandlers' Union.

clause as it applied to the language of section 1(b) remained the same. Veon stated, ''The language is what it says, and a large amount of presswork is not covered in that section.'' Veon added, ''The most gleaming example is the reel room.'' When asked by Union counsel whether the strikers would perform the pressmen's assignments listed in the Union's proposed section 1(b) if they returned to work, Veon answered that the Union could not claim such work under the Company's proposal. Veon's bargaining notes reflect that the November 13 meeting concluded soon after he suggested that an impasse had been reached:

> We have considered your proposals [on Section 1(b)], you have considered our proposals. Seems like we are now starting to engage in fruitless bargaining that will lead nowhere.

By letter dated November 13, Veon wrote Hagstrom to answer Union Attorney Sheldon Charone's question posed that day about the Respondent's intent to assign presswork. Veon answered, ''We see no significant difference from how we have assigned the work in the past.''

On November 18, Union President Hagstrom wrote Respondent's spokesman Veon, asking for clarification of his November 13 ''firm and final'' offer. The fifth question in Hagstrom's letter read:

> In respect to your section 1(b), would our members if they returned to work continue to perform work described in our section 1(b), such as: [list of 18 traditional functions in the pressroom and reel room as set forth in the Union's November 5 proposal].

Veon prefaced his November 25 response by stating, ''Some time ago . . . [the parties] reached impasse in negotiations . . . .'' Veon answered Hagstrom's first four questions, and then answered Hagstrom's fifth question as follows:

> The work assignments you proposed in your proposals for section 1(b) have not been agreed to by the Company. The broad management rights clause at Section 4 of our final offer clearly gives the Company the right to determine the work each employee shall perform within his or her job classification and to determine the make-up of its work force (the job classifications to be used and the number of persons in each job classification). Although our proposed contract gives the Union no contractual jurisdiction over the work described in your letter, the Company has no current plan to change the work assignment but will determine make-up of the work force of employees necessary to perform that work. In addition to supervisors, the Company may or may not determine to use any of the job classifications of Trainee, Associate Pressman, Apprentice, Plate maker, or Journeyman in any combination it deems effective and most economical. It is our intention to cover the vast majority of the work with Trainees, Associate Pressmen, and Apprentices.[12]

B. *Contentions of the Parties*

The General Counsel contends that this case turns on the Respondent's interpretation of section 1(b) in its November 13 ''firm and final'' offer—an interpretation based on its proposed zipper clause that limits the Union's exclusive contractual jurisdiction to make-ready items 1–6. According to the General Counsel, this proposal would alter the historical unit description by allowing the Respondent at will to reassign pressroom work to nonbargaining unit employees. Further, the General Counsel contends that the Respondent's insistence on this proposal created an impasse in bargaining on and after November 13. Therefore, the General Counsel alleges that the Respondent violated Section 8(a)(5) by insisting to impasse on a permissive subject of bargaining.

The Respondent contends that its proposal would not change the employees represented by the Union; that the scope of the bargaining unit is defined only in contract section 1(a); and that section 1(b) outlines the work assignments that the Union has the exclusive contractual jurisdiction to perform. The Respondent argues that it negotiated to transfer work without affecting the persons represented by the Union, and that it consistently advised the Union that it did not plan to remove work from the pressmen, much less change the scope of the unit. It claims that its contract proposals concerned work assignment, a mandatory subject of bargaining. See, e.g., *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975); *Hill-Rom Co. v. NLRB*, 957 F.2d 454 (7th Cir. 1992).

The Respondent also contends that it requested agreement only on the language of its proposed zipper clause, not on its interpretation or the effect of its interpretation on other contract provisions. Rather, the Respondent claims that it agreed to arbitrate this issue and never insisted that the Union agree to its interpretation of the proposed zipper clause as it applied to section 1(b).

C. *Analysis*

The judge noted that a party may not lawfully bargain to impasse over changes in unit description because the scope of the bargaining unit is a permissive

[12] The expired contract contained the classifications of junior pressman, apprentice, and journeyman. The joint apprenticeship program was citywide. Apprentices became journeymen after 4 years.

bargaining subject.[13] He found that, under extant law,changing the interpretation of contract section 1(b)'s definition of the work assignment would automatically change the unit description in section 1(a) because section 1(b) contains the phrase ''the above is defined to mean . . . .'' He found that the Respondent applied the proposed new zipper clause in its November 13, 1985, ''firm and final offer'' to limit the Union's contractual presswork jurisdiction to the make-ready items 1–6, plus the platemaking item 7.

Under this interpretation, the judge found that the Respondent could assign reel room and other presswork at its discretion. The judge held that this interpretation of the zipper clause had the effect of changing the scope of the bargaining unit from ''employees engaged in the operation of the presses'' to ''employees engaged in performing make-ready pressroom work and other pressroom work assigned to pressmen.'' The judge concluded that the Respondent's interpretation of its proposed zipper clause had the effect of changing the scope of the bargaining unit and was a permissive subject of bargaining on which the Respondent could not lawfully insist to impasse.

We reverse. We find that the Respondent's contract proposal is a mandatory subject of bargaining. We do not pass on the judge's finding that the parties reached impasse on November 13, 1985, on the Respondent's unit-description work jurisdiction proposal.[14] In light of our decision, we also do not pass on the judge's findings that the Respondent failed to withdraw its ''unlawful impasse demand'' and formulated a ''deceptive defense'' to the unfair labor practice charge.

As discussed above, section 1 of the expired contract defines the unit in terms of the work performed. Because of this close relationship between the composition of the bargaining unit and the specific jobs the unit performs, it is likely that a change in the unit's functions will have a concomitant effect on the scope of that unit. Therefore, any attempt to determine whether the allocation of work constitutes a work assignment rather than a change in unit scope is difficult.

Subsequent to the judge's decision, the Board articulated a new test for determining whether an employer may insist to impasse on a bargaining proposal that would alter an existing contract provision that defines a bargaining unit in terms of work assignments rather than job classifications. *Antelope Valley Press*, 311 NLRB 459, 460–461 (1993). This new test abandons attempts to characterize a disputed proposal of this type as relating exclusively either to unit scope or to work assignments, but not to both.

Under *Antelope Valley*, an employer that does not propose to change the unit-description language may lawfully insist to impasse on a proposal permitting it to reassign work currently performed by unit employees so long as the proposal does not preclude the union, after any reassignment of work, from claiming that employees performing the reassigned work are unit employees.[15] After impasse, the employer will be permitted to transfer work lawfully to nonunit employees for legitimate reasons. The employer, however, will not be privileged to determine the scope of the unit by insisting on a change in the unit description, even if, as here, the unit is described in terms of the work performed. The *Antelope Valley* test thus accommodates both a union's concern that any modification of a clause defining the unit by the work the unit performs changes the scope of the unit and an employer's concern that barring modification of such a clause restricts the transfer of work to nonunit employees even after bargaining to a lawful, good-faith impasse.[16]

In this case, the Respondent's October 24, 1985 proposal retains, in all material respects, the language of sections 1(a) and 1(b) of the 1979–1985 contract.[17] The Respondent's proposal also incorporated the Union's February 4 initial contract proposal that section 1(b) include a new item 7 to show plateroom jurisdiction. Thus, the parties agreed during bargaining that the unit description would not materially change. The parties' dispute arose over the Respondent's demands that its proposed new zipper clause as applied to section 1(b) was to be interpreted to limit the Union's exclusive contractual pressroom jurisdiction to make-ready items 1–6 plus the new item 7, and that using past practice to determine work assignments would be barred.

We find that the Respondent's explanation of its proposed zipper clause did not change the unit description. Thus, although the Respondent explained its proposal as giving the Respondent discretion to assign presswork to nonbargaining unit employees, this interpretation would only privilege the Respondent to assign the work to individuals who were not currently in the unit. The zipper clause as interpreted by the Re-

[13] See, e.g., *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 620–621 (6th Cir. 1982).

[14] As explained below, we find that a lawful impasse did exist later on November 1, 1986, when the Respondent implemented and posted conditions of employment.

[15] The Union's claim could be pursued before the Board, for example, in a unit clarification proceeding.

[16] Chairman Gould approves the *Antelope Valley* test. He notes, however, that he does not endorse the notion, as suggested by the analysis in that case, that the transfer of unit work is normally an employer ''privilege.'' The transfer of work, like all mandatory bargaining subjects, is subject to collective bargaining.

[17] The only change made in sec. 1(a) of the Respondent's proposal concerns the old CNPA contract language which described the unit to be all the pressrooms of the Employers. Because the Union withdrew from multiemployer bargaining and the present negotiations concern only the Union and the Respondent, the Respondent changed this clause to read ''the unit is in the Chicago Tribune's press department.'' The parties tentatively approved this change during bargaining.

spondent does not include a clear waiver by the Union of its right to contend that any individuals performing reassigned work should be included in the unit.

Further, when the Respondent's spokesman, Veon, advanced the proposal, he specifically disclaimed an intent to change the scope of the unit, which he understood to be defined by the following language in section 1(a)—''employees engaged in the operation of the presses in the pressrooms of the Employer and such rewinding machines of the Employer as they are used for printing. . . .'' Rather, the Respondent's zipper clause section 1(b) proposal merely gave it authority to transfer bargaining unit work to nonbargaining unit employees. The proposal did not alter whom the Union represented, but rather what work those employees would perform. Under the proposal, the Union retained the right to file a representation petition, unfair labor practice charge, grievance, or breach of contract action, claiming that the employees performing any reassigned work should be included in the unit.

We therefore dismiss this complaint allegation. We conclude that the Respondent's contract proposal was a mandatory bargaining subject upon which it could insist to impasse. Accordingly, we reverse the judge and find that the Respondent did not violate Section 8(a)(5) by bargaining to impasse on a demand to change the scope of the bargaining unit.

III. ALLEGED CONVERSION OF ECONOMIC STRIKE TO UNFAIR LABOR PRACTICE STRIKE

The judge found that the economic strike was converted to an unfair labor practice strike on November 13, 1985, by the Respondent's unlawful insistence to impasse on a zipper-clause interpretation that he found was a permissive subject of bargaining. The judge also found that the Respondent prolonged the strike by unlawfully refusing to reinstate unfair labor practice strikers and displace replacements hired after November 13, but before receipt of the Union's January 30, 1986 unconditional offer to return to work.

We have reversed the judge's finding that the Respondent unlawfully insisted to impasse November 13 on a permissive subject of bargaining. The General Counsel does not argue before us that any other unfair labor practice that occurred during the strike could have prolonged the strike.[18] Accordingly, the strike which began on July 18 remained an economic one until it ended on January 30, 1986, when the strikers unconditionally offered to return to work.

[18] In this regard, we note that at the hearing, the judge granted the Respondent's motion for summary judgment on the issue of whether the individual discharges of striking employees for picket line misconduct converted the strike to an unfair labor practice strike. Also during the hearing, the General Counsel withdrew his allegation that the payment of nonnegotiated wage rates for nonstrikers and returning strikers converted the strike to an unfair labor practice strike.

IV. REFUSAL TO REINSTATE ECONOMIC STRIKERS

A. *The Permanent Replacement Issue*

It is undisputed that the Respondent had replaced all strikers who unconditionally offered to return to work on January 30, 1986. As economic strikers, they were entitled to immediate reinstatement only if they had not been permanently replaced by the Respondent.[19] In our remand Order, we directed the judge to articulate his basis for finding that striker replacements hired after August 19, 1985, were permanent rather than temporary replacements. On remand, the judge concluded that the Respondent had met its legal burden of proving that the employees it hired to replace economic strikers were all permanent replacements. Although none of the replacements testified about their status,[20] the judge found that credited testimony from the Respondent's witnesses demonstrated a ''mutual understanding'' between the Respondent and the replacements that they were permanent.[21] We agree, for the reasons set forth below.

It is undisputed that strike replacements were hired on a temporary basis from the beginning of the strike until August 19, 1985. Vice President of Operations Gene Bell credibly testified that during the first month of the strike, the Respondent was having problems hiring employees in the pressroom without telling them that they were permanent replacements. He testified that on about August 19, he personally informed Pressroom Manager Richard Malone and other division managers that ''we [Brumbeck, Bell, and Veon] have made the decision to hire full-time regular employees to permanently replace the striking employees.'' That ''eliminated that [hiring] problem.''

Pressroom Manager Malone, the Respondent's principal witness on this issue, credibly testified that when interviewing applicants after Bell told him on August 19 about the Respondent's permanent-replacement decision, he told them that if they were hired, ''they were going to be permanent replacements.'' After employees were hired, they were required to attend orientation meetings. Malone credibly testified that ''as far as [he] knew,'' in these orientation meetings, he personally told all new pressmen—those hired both before and after August 19—that they were full-time regular employees permanently replacing striking employees.

[19] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[20] The Respondent excepts to the judge's rejection of its Exhs. 38(d), 41(a), (b), and (c), 88–93, 97, 111, 112, 126(a), 126(v), the majority of which are affidavits from replacements purportedly indicating that the Respondent told them of their permanent status. In light of our decision finding the replacements permanent, we find it unnecessary to pass on these exceptions.

[21] *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987).

Records introduced into evidence by the General Counsel indicate, however, that some replacements failed to attend any of the orientation meetings. Accordingly, if Malone had conveyed notice of permanent replacement only at those meetings, the Respondent would not have proved the requisite mutual understanding of permanent replacement status for those who did not attend the meetings. Although not specifically mentioned by the judge, Malone affirmatively testified ''with absolute certainty'' that he spoke to every pressroom employee about permanent replacement, regardless of whether an employee had failed to attend the orientation meetings. Based on this specific and uncontroverted testimony by Malone, whom the judge otherwise credited on the replacement issue, we agree with the judge that the Respondent has met its burden of proving that all economic strikers were permanently replaced prior to their January 30, 1986 offer to return to work.

B. *Refusal to Recall Economic Strikers as Vacancies Occurred*

As explained below, we agree with the judge that the Respondent failed to prove that its refusal to offer full reinstatement to strikers upon the departure of replacements was for legitimate and substantial business reasons. In this regard, we adopt the judge's findings that the Respondent failed to recall strikers as full-time vacancies became available; deliberately operated shorthanded as established in a confidential internal memorandum dated January 15, 1987 (the ''Pondel'' memo);[22] and used both end-of-shift overtime and sixth-shift or extra-day overtime to avoid recalling strikers.

In *Laidlaw Corp.*, the Board held that:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; [and] (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Applying this rule, we note initially that 52 replacements left the Respondent's poststrike press department between November 4, 1986 (when the limitations period began) and the close of the original hearing.[23] The Respondent has not established that progressive poststrike efficiencies always allowed it to absorb the departure of these replacement employees. The Respondent argues now that the weekly-straight-time rate plus benefits for reinstated journeymen was in fact greater than the average cost of paying replacement employees under the posted conditions. The Respondent, however, has failed to establish that it prepared or contemporaneously relied on documents or studies demonstrating the cost effectiveness of working replacements at increased overtime rates as compared to recalling strikers at straight-time pay and benefits. Indeed, Vice President of Operations Bell admitted that the Respondent made no studies to determine if it was more cost effective to work replacements at increased overtime as opposed to recalling the strikers at regular pay. Nor has the Respondent demonstrated that its refusal to recall strikers was based on studies tracking the frequency or distribution of sixth-shift overtime among the 21 shifts per week, which might have shown the infeasibility of eliminating four or five overtime shifts per week. Similarily, it has not shown that end-of-shift overtime was too irregular to permit reinstating strikers. In addition, the Respondent did not rebut Pondel's memorandum, which established that there was a shortage of employees.

We find, as did the judge, that the Respondent has failed to prove actual reliance on substantial and legitimate business reasons, if there were any, for refusing to recall strikers to full-time vacancies which arose after the departure of at least 52 striker replacements.[24] We conclude that since November 4, 1986, the Respondent violated Section 8(a)(3) by failing to offer re-

[22] We agree with the judge that this memorandum shows crew shortages on all three shifts, extending into January and February 1987, and that it reveals that Unger's three operations managers were aware of the Company's decision not to ''look outside the company for additional employees'' (a reference to reinstating strikers).

[23] The Respondent employed 295 employees on January 30, 1986; 234 employees (23 fewer than the 257 prestrike number) on November 4, 1986 (when the limitation period began); 218 employees (39 fewer than prestrike) on January 1, 1988; 192 employees (65 fewer than prestrike) on July 1, 1988; and 182 employees (75 fewer than prestrike) on December 1988.

[24] Most of the Respondent's specific evidence concerning efficiency, productivity, and the comparative costs of recalling strikers versus working replacements at increased overtime rates comes from the 10(j) proceeding, which followed the close of the original Board proceeding in January 1989. Our Decision and Order Remanding Proceeding to the judge granted the General Counsel's motion to strike references to this extra-record evidence. See fn. 2, supra. The Respondent has not shown that this evidence was newly discovered, previously unavailable, or contemporaneously relied on by it. Furthermore, we reject the Respondent's argument that we should give collateral estoppel effect to the findings of the district court in the 10(j) proceeding. It is well established that the Board need not give collateral estoppel effect to findings made in 10(j) proceedings. See, e.g., *Iron Workers Local 378 (N.E. Carlson Construction)*, 302 NLRB 200, 209 (1991); *NLRB v. Q-1 Motor Express*, 146 LRRM 2460, 2462 fn. 3 (7th Cir. 1994). Cf. *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 682–683 (1951) (a decision on jurisdiction made by a district court in an independent preliminary proceeding for interlocutory relief under Sec. 10(l) of the Act shall not foreclose a proceeding on the merits in an unfair labor practice case).

instatement to former strikers as full-time vacancies arose. Any additional full-time vacancies may be established at compliance.

With respect to part-time vacancies, we agree with the judge's analysis that the Respondent may be liable for its failure to recall a certain additional number of former strikers to part-time work instead of assigning overtime work. The record shows that the Respondent used part-time workers prior to the strike. In contract negotiations, it proposed only a change in the method of selecting part-time employees. At least nine former strikers on the preferential rehiring list were part-time employees. We leave to the compliance stage of this proceeding the determination of whether the Respondent has a remedial obligation to offer part-time employment to any other former strikers, including full-time employees, in addition to the nine part-time employees on the preferential rehire list.

V. REFUSAL TO FURNISH INFORMATION

The Union requested the names on January 30, and the names and addresses on April 7, 1986, of all strike replacements. On June 9, 1986, the Union further requested a weekly listing of the names, addresses, and reasons for terminations of discharged bargaining unit employees.[25]

Claiming that the pattern of strike violence had aroused its concern about replacements' personal safety, the Respondent refused to furnish the Union with the names and addresses of replacement employees, but offered a third-party alternative. The Respondent did provide the Union with weekly notice of terminations, but, without explanation, failed to provide reasons for the terminations of unidentified replacement employees.

The judge found that the Respondent violated Section 8(a)(5) by refusing to provide the above information.[26]

We agree with the judge that the Respondent violated Section 8(a)(5) by refusing to furnish the Union with the reasons for terminations of bargaining unit employees, including replacements. The Respondent failed to establish how the release of this requested information, without identifying the terminated replacements, was likely to result in harm to replacements.[27]

We find it unnecessary to pass on the judge's finding that the Respondent violated Section 8(a)(5) by refusing in 1986 to provide the Union with the names and addresses of strike replacements. The remedy that we would order for any such violation has been subsumed by the remedy that we ordered in *Chicago Tribune Co.*, 316 NLRB 996 (1995). That case involved the same parties, the same unit employees, and the same request for the names and addresses of striker replacement employees. There we ordered the Respondent to supply the union with the names and addresses of all employees in the pressmen unit, the same information sought by the Union in this case since 1986. In these circumstances, it is unnecessary for us to pass on the merits of this issue, because the remedy for any violation that might be found would not materially supplement the remedy already ordered in *Chicago Tribune*, supra.

VI. POSTED CONDITIONS OF EMPLOYMENT AFTER LAWFUL IMPASSE

On November 1, 1986, the Respondent declared impasse and issued a document entitled ''Posted Conditions of Employment.'' This document acknowledged the Union as collective-bargaining representative and announced a change in conditions of employment to conditions the Respondent had proposed in its September 22, 1986 final offer. Based on his finding that the Respondent had unlawfully bargained to impasse on November 13, 1985, and had refused to withdraw its unlawful impasse demand, the judge concluded that the unilateral changes in working conditions on November 1, 1986, violated Section 8(a)(5).

We have reversed the judge's finding that the Respondent unlawfully insisted to impasse on November 13, 1985, on a permissive subject of bargaining. The only reason advanced by the General Counsel as precluding lawful impasse in November 1986 is grounded in this reversed unfair labor practice allegation.

We conclude that the parties were at impasse by September 22, 1986,[28] for the following reasons. The parties' hard bargaining in 1985 continued regularly throughout 1986 without agreement being reached on most of two dozen important issues regarding mandatory bargaining subjects. Considering the bargaining history, including the lengthy period of time that the parties were at loggerheads over these issues; the overall good-faith of the parties in attempting to resolve these issues; the importance of the numerous unresolved issues involving mandatory subjects in reaching an overall agreement; and the understanding expressed by both sides that their positions had become predomi-

[25] The Union subsequently filed charges on behalf of two discharged replacements, Joe Outlaw and Ronald Graham.

[26] In the absence of exceptions, we adopt the judge's dismissal of the complaint allegation that the Respondent refused to furnish the Union with information about the number of supervisors performing bargaining unit work.

[27] Based on undisputed evidence that the Respondent did provide the Union with weekly notice of terminations, we find, contrary to the judge, that the Respondent did not violate the Act by refusing to provide this information.

[28] The judge did not specifically find that there was no impasse on September 22, 1986, nor did he find that the Respondent implemented terms and conditions of employment inconsistent with its final offer. The judge excluded most evidence relating to the parties' specific bargaining proposals during the period between January 30 and November 1, 1986.

nantly fixed and that negotiations had reached the point of stalemate, we conclude that by September 22, 1986, the parties were at lawful impasse. Thus, the Respondent was free to make, and in fact did make, unilateral changes in working conditions on November 1, 1986, that were consistent with its final September 22 offer that the Union had rejected.[29]

Accordingly, we dismiss this allegation.[30]

AMENDED REMEDY

We find merit in the General Counsel's and the Charging Party's exceptions to the judge's omission of a make-whole remedy for the Respondent's unilateral change in wage rates that has been found unlawful. Our make-whole remedy, however, is limited to the period from October 25, 1985, until November 1, 1986, when the parties reached an overall lawful impasse that subsumed this change. This does not, however, require or permit any unilateral changes of improved wages, benefits, or working conditions. Backpay shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As stated in section IV, B, above, we leave to compliance the determination of whether the Respondent will be required to offer part-time employment to any other former strikers, including full-time employees, in addition to the nine part-time employees on the preferential rehire list.

The judge recommended that the Union be granted access to the Freedom Center to meet at reasonable times with bargaining unit employees in nonwork areas during nonworking time. We find that an access remedy is unnecessary in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to offer reinstatement to employees on the preferential-hiring list to full-time and any part-time vacancies as they occur.

(b) Refusing to furnish the Union with the reasons for the terminations of bargaining unit employees.

(c) Paying nonnegotiated wage rates to nonstrikers and returning strikers without bargaining with the Union to agreement or to lawful impasse.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to employees on the preferential hiring list to their former positions to fill full-time and any part-time vacancies that have occurred since November 4, 1986, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of its failure to reinstate them when the vacancies occurred.

(b) Offer Arthur Vehlow immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his discharge.

(c) Remove from its files any reference to Vehlow's unlawful discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Furnish the Union with the reasons for the terminations of bargaining unit employees.

(e) Make whole any nonstrikers or returning strikers, who suffered any loss of wages because of the Respondent's payment of nonnegotiated wage rates from October 25, 1985, until November 1, 1986, as set forth in the amended remedy.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-

[29] Accordingly, we find it unnecessary to address the Respondent's exception claiming that this complaint allegation must be dismissed because the judge improperly granted the General Counsel's motion at trial to amend the complaint to add this allegation.

[30] We agree, however, with the judge's finding that since October 25, 1985 (the judge incorrectly referred to October 27) the Respondent, without prior notice to the Union and without having afforded it the opportunity to bargain, paid nonstrikers and returning strikers nonnegotiated wage rates in violation of Sec. 8(a)(5). See *River City Mechanical*, 289 NLRB 1503, 1505 (1988); *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987); and *Marbro Co.*, 284 NLRB 1303 (1987). We also agree with the judge that the Respondent showed no necessity for unilaterally establishing a new wage scale and new classification (pressroom employee) for the nonstriking junior pressmen.

The General Counsel did not allege that the Respondent violated Sec. 8(a)(5) by failing to bargain about the terms and conditions of employment for strike replacements. Chairman Gould and Member Browning disagree with Board precedent holding that employers have no obligation to bargain about the terms and conditions of employment for striker replacements during the course of an economic strike. In their view, the employer's duty to bargain with the union encompasses all unit employees, including both the strikers and the replacements (as well as any nonstrikers and returning strikers who may be working), because all such employees are members of the bargaining unit. In their view, as part of its obligation to bargain with the union in good faith, the employer must maintain existing terms and conditions of employment during the pendency of negotiations until a lawful impasse is reached, at which point the employer is privileged to implement only those terms and conditions that are consistent with its last offer to the union. Chairman Gould and Member Browning believe that these principles should be applied to govern the terms and conditions of all unit employees, including replacement workers during an economic strike.

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Freedom Center facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[31] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to offer to reinstate economic strikers on the preferential-hiring list to fill full-time and part-time vacancies.

WE WILL NOT refuse to provide the Union with the reasons for the termination of bargaining unit employees.

WE WILL NOT pay nonnegotiated wage rates to nonstrikers and returning strikers until we have bargained with the Union to agreement or to lawful impasse. However, we will not change any improvements unilaterally.

WE WILL offer immediate and full reinstatement to employees on the preferential hiring list to their former positions to fill full-time and part-time vacancies that have occurred since November 4, 1986, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our failure to reinstate them when the vacancies occurred, less any net interim earnings, plus interest.

WE WILL offer Arthur Vehlow immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Arthur Vehlow that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL furnish the Union with the reasons for the terminations of bargaining unit employees.

WE WILL make whole any nonstrikers or returning strikers, who suffered any loss of wages because of our payment of nonnegotiated wage rates from October 25, 1985, until November 1, 1986, with interest.

CHICAGO TRIBUNE COMPANY

Paul Bosanac, Esq., for the General Counsel.
R. Eddie Wayland and *James P. Thompson, Esqs. (King & Ballow)*, of Nashville, Tennessee, for the Respondent.
Sheldon M. Charone, Esq. (Carmell, Charone, Widmer, Mathews & Moss), of Chicago, Illinois, for the Union.

SUPPLEMENTAL DECISION

I. OVERVIEW OF REMAND ISSUES

The Board remanded this proceeding (a) ''for further findings and conclusions with respect to'' the Company's three affirmative defenses (each alleged to show that the Union's strike was illegal) and (b) for ''articulating the basis'' for the finding that striker replacements hired from July 18 (when the strike began) to November 13, 1985, were permanent, not temporary. *Chicago Tribune Co.*, 304 NLRB 259 (1991). A hearing on remand (following unsuccessful settlement efforts) was held on December 2–6 and 9–11, 1991, and January 13, 1992, and (after a subpoena enforcement proceeding) was concluded on July 7–8, 1992.

The first affirmative defense is that the Union (Pressmen) ''bargained to impasse upon the inclusion of supervisors in the bargaining unit, a permissive subject of bargaining.'' To the contrary, as found below, the evidence shows that the Union was instead insisting that supervisors, if excluded, should not be permitted to perform bargaining unit work. There was no impasse on including supervisors.

The second affirmative defense is that the Union unlawfully engaged with the Printers and Mailers in coordinated

(coalition) bargaining in which ''one union would not seriously attempt to get a contract unless the other two did.'' To the contrary, the evidence clearly shows that the Company and the Union exerted sincere efforts to reach an agreement. As found in my December 12, 1989 decision, *Chicago Tribune Co*., 304 NLRB at 267:

> Both the Company and Union engaged in hard bargaining [in negotiations that began February 8, 1985] and little progress was made in resolving . . . major differences.
>
> Finally on June 20, 1985 [over 4 months later], after Vice President of Operations Gene Bell had entered the negotiations, both parties began demonstrating a sincere desire to compromise and avoid a strike. In nine off-the-record discussions (some of them quite long, lasting into the night or early morning hours), they sought solutions to the . . . major issues . . . .
>
> . . . .
>
> The effort failed, however, when the parties could not agree on all the provisions as a package.

The third affirmative defense is that the Union ''engaged in unlawful surface bargaining,'' not ''sincerely negotiating to get an agreement.'' Particularly in view of the union members' risk of jeopardizing their guaranteed working-life job security if they could not reach an agreement and were permanently replaced, I deem this defense to be unfounded.

Permanent replacements. Regarding the finding (supra at 267) that in the middle of August 1985 (a month after the strike began) ''the Company began permanently replacing the striking pressmen,'' credible evidence shows a mutual understanding between the Company and the replacements after August 19 that the replacements were permanent.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I find and conclude as follows.

Affirmative Defenses

II. FIRST DEFENSE, IMPASSE ON SUPERVISORS

A. *Before off-the-Record Discussions*

The dispute over supervisors involved the proposed removal of about 60 jobs from the pressroom bargaining unit (Tr. 3713 1/18/89; R. Exh. 32 item 14).

Historically, all working foremen and supervisory men-in-charge were included in the bargaining unit and were members of the Union (Tr. 4922 12/9/91). Until the parties held off-the-record discussions preceding the July 18, 1985[1] strike, the Company was proposing that these and other pressroom supervisors be excluded without any restriction on their continuing to perform bargaining unit work.

The Company proposed on February 15: ''All supervisors as defined under the National Labor Relations Act, as amended, shall be excluded from coverage under this Contract'' (G.C. Exh. 7 sec. 7, p. 7). On May 21, Company Vice President and Chief Spokesman George Veon orally suggested that the Union agree to this proposal—that is, to exclude the supervisors from the bargaining unit without any work restriction, taking the 60 unit jobs with them—then the Union could ''propose [the supervisors] not working'' (Tr. 4647 12/5/91; G.C. Exh. 176 p. 323).

In response, the Union sought to retain the working supervisors in the bargaining unit, but readily acknowledged that their inclusion was a permissive subject of bargaining. On March 29, International Vice President Guy DeVito ''stated that the issue of supervision was not a mandatory subject of bargaining that could . . . be insisted [on] to impasse [but] if the company demanded the exclusion of supervisors from the Union, the Union would stand on its proposal that they could not perform bargaining unit work'' (Tr. 2462–2463 1/20/88).

Labor Relations Manager William Howe's bargaining notes confirm these positions. His April 17 notes (G.C. Exh. 176 p. 217) read:

> Veon says would it be correct to say that you agree with [excluding supervisors] but we disagree on whether they perform work.
>
> DeVito says that's correct.

Howe's notes on May 1 (p. 247) read (with abbreviations spelled out):

> Supervisors—you agree the law says they come out, but that your position is they do no bargaining unit work.
>
> DeVito concurs.

Howe admitted that the Union ''said on more than one occasion that they understood that the law [is] that supervisors couldn't be insisted to be under the contract'' (Tr. 4973 12/9/91).

B. *Off-the-Record Discussions*

On July 3, during off-the-record discussions that began before the July 7 strike deadline, the Company offered a compromise. At 9:10 p.m. (over 12 hours after discussions began that morning), it included in its off-the-record proposal (R. Exh. 101 par. c, p. 2) the following supervisor provision:

> All supervisors . . . shall be excluded from coverage under the agreement; all supervisors may do work that is considered bargaining unit work *only to the extent necessary to carry out supervisory functions*. [Emphasis added.]

In the next meeting that began on July 6 the Union submitted an off-the-record proposal (R. Exh. 105) at 12:36 a.m., July 7, in response to this and other company proposals. It agreed to exclude supervisors, but sought an unqualified prohibition against supervisors performing bargaining unit work (R. Exh. 105 par. c, p. 2):

> Supervisors—excluded from bargaining unit—shall not perform bargaining unit work.

At 10 o'clock that evening, July 7, the Union submitted ''on the record'' another proposal (R. Exh. 107; G.C. Exh. 176 p. 379), which also placed on the record its 12:36 a.m. July 7 proposal. DeVito credibly explained that ''this was to move into a firm position for a settlement . . . the tactic we employed in an effort to get a contract'' (Tr. 5145 12/10/91).

[1] All dates are in 1985 unless otherwise indicated.

Beginning at 2:20 a.m., July 8 (beyond the midnight strike deadline, with the ''clock stopped,'' Tr. 4675 12/5/91), the Company gave its oral off-the-record response to this and other open issues (G.C. Exh. 176 pp. 382–383; R. Exh. 25 pp. 83–84). In the next meeting on July 10, the Company incorporated this response in an off-the-record written proposal (R. Exh. 109; G.C. Exh. 189).

In this oral and written response the Company was refusing to agree with the Union's proposal for an unqualified prohibition against supervisors performing bargaining unit work. It included qualifying language similar to the language it used in its July 3 proposal, which permitted supervisors to perform unit work ''to the extent necessary to carry out supervisory functions.''

Without specifying what bargaining unit work would be included in ''customary supervisory duties,'' the Company proposed the following provision (R. Exh. 109; G.C. Exh. 189 par. c, p. 3):

> All supervisors . . . shall be excluded from coverage under the agreement; all such supervisors shall not perform bargaining unit work *but shall perform customary supervisory duties*. [Emphasis added.]

The Union's response (R. Exh. 110 p. 2; Tr. 4691 12/5/91) was ''No agreement.'' As both Union President Hagstrom (Tr. 2446 1/20/88) and DeVito (Tr. 5154 12/10/91) credibly testified, the parties agreed to the first part (the exclusion of supervisors), not the last part (the qualifying language, ''but shall perform customary supervisory duties'').

The bargaining notes of Company Attorney James Kulas (a management bargaining committee member) state that at the next meeting on July 15, DeVito said there was no agreement on 15 of 25 items, 8 of which were ''tough ones,'' including the ''very sticky'' supervisor issue (Tr. 4704 12/5/91). Further testifying from his notes (which are not in evidence), Kulas added (Tr. 4705 12/5/91) that Hagstrom made what Kulas termed ''an emotional plea'' for including supervisors in the bargaining unit, because the system had been there a long time and had worked ''and all we were doing is putting the supervisors in the middle who had been union members for a long time.''

I infer from this evidence that the Union's bargaining strategy was to seek either to obtain an unequivocal contractual provision that supervisors shall not perform bargaining unit work (saving the bargaining unit work for unit journeymen), or to persuade the Company to permit men-in-charge and foremen to remain in the unit.

C. *During the Strike*

After the beginning of the strike on July 18, the Company withdrew its off-the-record proposals, stating that ''we never reached agreement on anything'' and ''everything is on the record from now on'' (G.C. Exh. 176 pp. 406, 411; Tr. 4846 12/6/91).

On July 30, the Company returned to its earlier suggestion that the Union agree to exclude supervisors and then propose, after the supervisors were excluded, that they not perform bargaining unit work. The Company divided its supervisor proposal into two parts as follows (G.C. Exhs. 49, 50):

> Section 32. All supervisors . . . shall be excluded from coverage under the Contract.
>
> Section 32A. Supervisors . . . may perform bargaining unit work.

The Union refused to ''TA'' (tentatively agree to) section 32 (which would remove about 60 jobs from the bargaining unit) and afterwards bargain on their continued performance of unit work. As Kulas testified (Tr. 4724 12/6/91), DeVito responded no, that he would not accept section 32 unless it included ''language not to do bargaining unit work.''

Kulas later conceded that the Company's position was that ''if [the supervisors] were excluded, we didn't see any reason to change them from what they did before under the old contract''; they would ''continue to do bargaining unit work'' (Tr. 4838 12/6/91). He also conceded that Union Attorney Sheldon Charone said the Company ''had a perfect right . . . to have [the supervisors] excluded,'' but the Union ''had the right to insist that they don't do bargaining unit work'' (Tr. 4859 12/6/91).

The Union proposed on July 30 (Tr. 4865–4867 12/6/91, Tr. 5028–5029 12/10/91; G.C. Exh. 54) that if the Company would withdraw section 32, it would agree to delete from its proposal the supervisor provision (''It is *mutually agreed* [emphasis added] that all pressroom supervision shall be members of the Union'') in section 26 of the expired 1979 agreement (G.C. Exh. 51 p. 26).

Regarding that supervisor provision, I note that Howe's May 24 bargaining notes (G.C. Exh. 176 p. 344; Tr. 3801–3802 1/18/89) show that DeVito then stated that the ''foremen language in Section 26 . . . says mutually agreed and since you don't mutually agree it will no longer be in contract. . . . Veon says yes. I thought that's what your position has been all along.'' As found, Howe admitted that the Union ''said on more than one occasion that they understood that the law [is] that supervisors couldn't be insisted to be under the contract'' (Tr. 4973 12/9/91). His notes on August 6 (G.C. Exh. 176 p. 458) reveal an example, when DeVito ''says we understand your right to [exclude supervisors],'' but adding: ''We say [they] do no [bargaining unit] work.''

The Union proposed that the following supervisor provision be substituted:

> Pressroom supervision *may* be excluded from coverage under the Contract *at the discretion of the Publisher*, however, all such supervisors so excluded shall not perform bargaining unit work. [Emphasis added.]

Kulas conceded that this proposal (G.C. Exh. 54) was telling the Company that the Union was no longer demanding ''that supervisors be members of the Union'' (Tr. 4808 12/6/91). DeVito credibly recalled that the Union proceeded ''under the assumption that if [foremen and assistant foremen] were out of the bargaining unit and declared supervisors, they would also withdraw from membership in the union'' (Tr. 5133 12/10/91).

On October 23 the Union submitted a proposal, responding to the Company's October 4 proposal (G.C. Exh. 66), which included sections 32 and 32A. The union proposal included the following provisions (G.C. Exh. 67 pp. 6, 11):

> Section 7. No foreman, acting foreman or assistant foreman shall be subject to fine, discipline or expulsion

> by the Union for any act they may perform as foremen in carrying out the terms of this Agreement. . . .
>
> . . . .
>
> Section 31. Press Department supervision may be excluded from coverage under the Contract *at the discretion of the Employer*, however, all such supervision so excluded shall not perform bargaining unit work. [Emphasis added.]

Howe admitted his understanding was that those supervisors who, ''at the discretion of the Employer'' were not excluded, ''would be covered under the contract and be members of the union'' (Tr. 5078–5079 12/10/91).

On December 18, the Union attempted to accept the Company's July 10 off-the-record supervisor proposal by proposing the identical language (G.C. Exh. 74 p. 8; R. Exh. 109 p. 3):

> All supervisors . . . shall be excluded from coverage under the Agreement; all such supervisors shall not perform bargaining unit work but shall perform customary supervisory duties.

The Company did not agree. At this time, as DeVito credibly testified (Tr. 5136 12/10/91), it was not the Union's position that supervisors had to be members of the Union.

Finally on February 26, 1986, the Company sent the Union a letter by messenger (G.C. Exh. 121), stating that ''the Company would like to know if the union's position is that the parties are at impasse on the Company's proposal for a new Section 32 ['All supervisors . . . shall be excluded from coverage under the Contract']?'' The same day the Union replied by letter (G.C. Exh. 122) that ''we have stated during negotiations that you have the right to exclude supervisors as defined by the Act from the bargaining unit. We are not at impasse in respect to Article 32.''

At the March 7, 1986 meeting the Union ''TA'd'' section 32 in the Company's latest proposal (G.C. Exh. 176 p. 662; R. Exh. 25 p. 148). But, as Hagstrom credibly testified, this tentative agreement on section 32 did not ''bring the parties any closer'' to achieving a collective-bargaining agreement (Tr. 5542 7/7/92). The dispute over supervisors' performing bargaining unit work continued (Tr. 4745–4749 12/6/91, Tr. 5096 12/10/91).

D. *No Impasse on Including Supervisors*

The evidence shows that the Union never insisted to impasse on the inclusion of supervisors in the bargaining unit, or on their union membership.

As found, the Union acknowledged on March 29 (soon after the bargaining began) that ''the issue of supervision was not a mandatory subject of bargaining that could . . . be insisted [on] to impasse.'' Kulas conceded (Tr. 4777 12/6/91): ''I don't recall any specific reference to the supervisor issue'' being at ''impasse.''

The issue was whether supervisors, if excluded, should be permitted to continue performing bargaining unit work. The parties continued to bargain on that issue. The Union's ''TA'ing'' the section 32 supervisor provision on March 7, 1986, did nothing to bring the parties closer to reaching an agreement.

Moreover, the Company admits in its brief (at 64) that it ''did not believe that the parties were at impasse in late 1985'' (months after the strike began in July). The Company in effect indicated on February 26, 1986, that it was not aware of any impasse before then on the supervisor issue when it inquired if the Union's position ''is that the parties are at impasse on the Company's proposal for a new Section 32?''

E. *Concluding Findings*

Although contending that there was no impasse in bargaining, the Company argues in its brief (at 60–65) that if the parties were at impasse on November 13 on another issue, as previously found, ''the parties [also] were at impasse on the exclusion of supervisors from the bargaining unit.'' To the contrary, the evidence shows that the Union never bargained to impasse on including supervisors.

Earlier in its brief (at 35) the Company contends that its allegation ''that the Union bargained to impasse upon the inclusion of supervisors in the bargaining unit'' is ''the most simple and incontrovertible'' of its three affirmative defenses.

I find, however, that in the absence of an impasse, the Company's affirmative defense that the strike was illegal because the Union ''bargained to impasse upon the inclusion of supervisors'' lacks merit. I therefore reject this first affirmative defense.

III. SECOND DEFENSE, COORDINATED (COALITION) BARGAINING

A. *Overview*

As found, the Company and the Union demonstrated ''a sincere desire to compromise and avoid a strike'' during nine off-the-record meetings after Vice President of Operations Gene Bell entered the negotiations.

Yet the Company contends in its brief (at 35) that the Union was engaging in ''unlawful coordinated bargaining'' and ''would not seriously attempt to get a contract unless the other two [unions] did,'' referring to the Printers and Mailers.

In support of this affirmative defense the Company presents an unconvincing version of both legal precedents and the facts of this case.

First, it makes the unequivocal contention in its brief (at 37): ''The Board has repeatedly held that unions violate the Act by engaging in coordinated bargaining.'' To explain this statement of legal precedents, it defines ''coordinated bargaining'' as a ''bargaining strategy with other unions [by which] a union unlawfully expands its bargaining beyond the unit it represents''—a definition often used to define unlawful ''coalition bargaining.'' It then proceeds to cite evidence of lawful coordinated activities, as well as evidence of purportedly unlawful coalition bargaining, as proof of this ''unlawful coordinated bargaining.''

Second, as proof that the Union was unwilling to sign a contract unless the Printers and Mailers also signed, the Company relies on a May 13 statement (by Edward Brabec, president of the Chicago Federation of Labor) that was unauthorized and not taken seriously by either the Unions or the Company: that ''all the unions must have a contract before

any union will settle and that Mr. Brabec has the support of all of the unions.''

Third, it treats as one organization the CFL Unity Council (consisting of about 10 local unions) and the Strike Unity Council (consisting of the 3 striking Unions) when contending that the Union and the Printers and Mailers appointed Brabec as their spokesman and authorized him to speak to the Company on May 13 on their behalf.

Fourth, the Company makes factual contentions that I find unpersuasive.

B. *Coalition or Coordinated Bargaining; Terms Defined*

The Company repeatedly contends in its brief (at 8, 35, 51, 54, 57, 58) that the Union (Chicago Web Printing Pressmen's Union No. 7) was engaged in a ''coalition'' with the Printers (Chicago Typographical Union No. 16) and Mailers (Chicago Mailers Union No. 2) and that the three Unions were parties to a ''coalition'' agreement for dealing with the Company. Elsewhere in its brief the Company refers to the three Unions having engaging in unlawful ''coordinated'' bargaining.

It is well established in Board and court decisions that unions as well as employers may lawfully engage in coordinated bargaining.

As summarized in Morris, *The Developing Labor Law* (2d ed., vol. 1, BNA 1983), ''Coalition and Coordinating Bargaining'' (at 666–667):

> The terms ''coalition'' or ''coordinated'' bargaining are often used interchangeably, although there is a logical difference between the terms which corresponds to the intent and nature of the mutual bargaining activity. ''Coordinated'' bargaining connotes communication and accommodation among different bargaining agents but *independent decision making* in separate bargaining processes. Such activity is therefore not illegal as such. ''Coalition'' bargaining, on the other hand, implies a de facto merger of bargaining units, or an effort to achieve that end. Thus, to the extent such a merger is forced on a nonconsenting bargaining partner, a refusal to bargain, by virtue of insistence on a nonmandatory bargaining subject, results. [Emphasis added.]

A major case cited by the General Counsel makes the distinction between lawful ''coordinated'' bargaining and unlawful ''coalition'' bargaining. *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969), enfg. *General Electric Co.*, 173 NLRB 253 (1968). As here, the employer alleged an affirmative defense that the union would not reach an agreement until other unions did.

In that case, as held by the Board (173 NLRB at 253, 258), the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (IUE) added to its negotiating committee as *nonvoting* members, a representative from each of seven other International unions. The eight International unions had formed the Committee on Collective Bargaining (CCB), whose purpose was to *set common goals* and to seek to *achieve those objectives* through a ''coordinated approach.'' General Electric ''refused to engage in discussions with the Committee and left the [negotiating] room,'' having previously stated that the participating unions hoped to engage in ''coalition bargaining.'' The Board found that this refusal to meet because of the presence of ''outsiders'' on the negotiating committee violated Section 8(a)(5) and (1).

General Electric based its affirmative defense on issues of the CCB publication ''Unity,'' on more than 40 leaflets, newspapers, statements, etc., and on statements attributed to stewards of union locals at grass roots meetings. Citing this material, it contended that the IUE and the other unions had ''pledged that no one of them would consummate a contract covering any bargaining unit with [General Electric] until all should do so.'' The trial examiner found to the contrary (173 NLRB at 265) that

> there was never any conspiracy, agreement, express or implied, among the cooperating unions *that none would sign with [General Electric] unless all signed*. Instead, I find there was a mere tacit understanding that before any of them varied or abandoned any of the agreed ''national goals,'' they would *inform and consult* with each other. . . . [E]ach union retained the ''autonomous'' status . . . so that each was free at all times to sign with [General Electric] on terms it deemed acceptable. [Second emphasis added.]

The Board (173 NLRB at 254–255) held that because *General Electric*

> left the negotiating table before negotiations began . . . we need not decide whether [its] refusal to bargain might have been justified if, in fact, the participating unions had been ''locked in'' to a conspiratorial understanding.

In its often-cited decision, the Second Circuit referred to the avowed purposes of the members of the CCB to ''coordinate'' bargaining and to the Company's refusal to participate in any eight-union ''coalition'' discussions. It held in relevant part (412 F.2d at 522–523):

> Thus, we have decided that it was improper for the Company to refuse to bargain . . . on the ground that members of other unions were on the IUE committee. However, we must still deal with the Company's claim that in any event it could refuse to meet with the IUE committee . . . because the IUE was ''locked-in'' to an agreement whereby it would not accept any offer made by the Company until the other unions did.
>
> The Board rejected [this contention] without deciding whether [this] factor would have justified a refusal to meet. . . . However, the trial examiner found . . . the IUE was [not] ''locked-in'' . . . and the Board found that there was no substantial evidence of the IUE committee's ulterior motive or bad faith. . . . [T]he IUE *disclaimed any intention* to bargain for others and maintained its ability to enter into any agreement that satisfied its demands regardless of the position of other unions. Still, the Company did not offer to test IUE's good faith. . . .
>
> The Company was guilty of a refusal to bargain in violation of section 8(a)(1) and (5) of the Act. [Emphasis added.]

Both the Board and court decisions make it clear that the coordinated bargaining itself was lawful.

In the three purported ''coordinated bargaining'' cases on which the Company relies, the Board and the courts either affirmed that unions may lawfully engage in coordinated bargaining, or found specific unlawful conduct without labeling it coalition or coordinated bargaining.

The Company first cites in its brief (at 37, 38, 43, 44, 46, 51) the Board's decision in *NLRB v. South Atlantic District Longshoremen ILA (Lykes Bros.)*, 443 F.2d 218, 219–220 (5th Cir. 1971), enfg. 181 NLRB 590 (1970). In that case, bargaining with a separate local of clerks and checkers ''did not begin until . . . a few days after the longshoremen and the [employers] reached agreement.'' Although the longshoremen locals ''had reached a full agreement with the employers, they refused to return to work or to execute the agreement until a contract had been agreed upon by the clerks and checkers.'' Agreeing with the Board, the court held (443 F.2d at 220):

> When parties to collective bargaining reach a final agreement on the terms of the agreement, they have a duty to execute that agreement by written contract, and this duty may not be avoided by injecting extraneous issues into the negotiations. . . . A union enjoying statutory status as exclusive representative of all employees within a bargaining unit may not unilaterally extend the scope of its agency authority and insist to impasse upon the employer's capitulation to the demands of other employees and other unions. . . . So to attempt to expand the bargaining power and influence of the longshoremen beyond the bounds of the Board-authorized appropriate bargaining unit constituted an unfair labor practice.

Neither the Board nor the court called this unlawful attempt to expand bargaining beyond the unit, after a full agreement had already been reached, either coalition or coordinated bargaining.

The case next cited in the Company's brief (at 37, 42, 75, 78) is the Board's decision in *Standard Oil Co. [of Ohio] v. NLRB*, 322 F.2d 40, 42–45 (6th Cir. 1963), enfg. 137 NLRB 690 (1963). In that case the court (322 F.2d at 44) adopted the trial examiner's statement that

> [t]he evidence in the instant case is clear enough that *both* on [Sohio's] part and on that of the Unions there is intramural communication and *coordination* with respect to bargaining positions. [Emphasis added.]

The unions' ''Sohio Council'' (which was composed of several Ohio locals) had *adopted a bargaining program* for the locals to follow in negotiations at the four Sohio refineries. The International president had issued credentials to six members of the four bargaining committees to serve as ''temporary representatives'' of the International on the committees other than their own. The plant managers refused to meet with the regular bargaining committees as long as the temporary representatives were present.

The court held in effect that the coordinated bargaining (each local's bargaining committee being composed of both members of that local and members of other locals) was lawful. It affirmed (322 F.2d at 44) the Board's finding that Sohio violated Section 8(a)(1) and (5), concluding that it was the duty of Sohio ''to negotiate with the bargaining committees of the Unions at the respective refinery plants even though the temporary representatives were present.''

The court's second holding in the case, however, was that the International and one of the locals unlawfully delayed signing agreements reached at the Cleveland and Lima refineries until an agreement was reached at Toledo. The court held (322 F.2d at 45) that imposing an agreement at the Toledo refinery (an ''extraneous matter'') as a condition for signing agreements previously reached at the other refineries violated Section 8(b)(3). Neither the Board nor the court called the decision to delay signing the Cleveland and Lima agreements, until an agreement was reached at Toledo, either coalition or coordinated bargaining.

Thus, the unions' engaging in coordinated bargaining was lawful, but the delay in signing agreements that had already been negotiated was unlawful.

In the third purported ''coordinated bargaining'' case cited by the Company in its brief (at 38, 42, 46, 55), *AFL–CIO Joint Negotiating Committee (Phelps Dodge)*, 184 NLRB 976 (1970), enf. denied 459 F.2d 374 (3d Cir. 1972), there was no finding of unlawful coalition or coordinated bargaining. Neither term was used by either the Board or the court.

As recited in the court's opinion (459 F.2d at 376–377), ''the parties agreed to the joinder of all of the [40] bargaining units in Arizona locations into a single negotiating format,'' called the Joint Committee. There was no contention or finding that this coordinated bargaining was in itself unlawful. The ''negotiations were conducted separately in the various units of Phelps Dodge and . . . there was no insistence on discussion in one locale as to the contract of another locale.''

The Board found (184 NLRB at 976–978) that the unions'

> primary objectives throughout the course of bargaining at [Phelps Dodge's] Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and that the strikes . . . were intended, in substantial part, to force [Phelps Dodge] to accede to . . . demands for such a companywide agreement. . . .
>
> . . . .
>
> Accordingly, we find that the [unions], by demanding that [Phelps Dodge] engage in companywide bargaining, beyond the scope of established bargaining units, and by striking in support of its demands, have violated Section 8(b)(3) of the Act.

To the contrary the court, denying enforcement, held (459 F.2d at 378):

> We conclude from this record that in the Arizona negotiations petitioner unions did not insist that Phelps Dodge agree to terms and conditions of employment to be applicable generally to other bargaining units and that they did not strike to enforce such a demand.

I do not agree with the Company's contention in its brief (at 42) that the Board found in that case that the ''unions engaged in unlawful coordinated bargaining.'' The Board did not find that the unions were engaging in either unlawful co-

alition or coordinated bargaining. It made a finding (rejected by the court) that the unions were unlawfully demanding companywide bargaining.

The Company contends a total of 23 times in its brief (at 34–60, 74) that the Union was engaging in ''unlawful coordinated bargaining.'' In doing so, it fails to distinguish between lawful coordinated activities and purportedly unlawful bargaining.

C. *Lawful Coordinated Activities*

1. On the part of the Company

The Company and the Chicago Sun-Times engaged in coordinated bargaining, without any contention being made that this bargaining was unlawful.

The two publishers were members of the Chicago Newspaper Publishers Association (CNPA), through which they historically negotiated with a number of unions. On January 3, the Union withdrew its consent to engage in further multiemployer bargaining (G.C. Exh. 87). On February 8, it began negotiating separately with the Company for an agreement to replace the 1979 CNPA agreement, which was to expire April 3.

After the withdrawal from multiemployer bargaining, the Company engaged in coordinated bargaining with the Sun-Times in negotiations with the Union. It included Burton Abrams, the Sun-Times director of employee relations, on the company negotiating team in bargaining sessions on February 8, 15, 25, 26, March 4, 11, 27, 29, April 30, May 8, and June 28—until the Sun-Times and the Union agreed in separate negotiations on a new contract, which the union membership ratified June 30 (R. Exhs. 17 p. 30, 25, 98 p. 853 insert; Tr. 4263, 4307 12/3/91).

I note that in 1985 and 1986, Company Attorney Kulas was the CNPA executive director, who ''joined the Chicago Tribune Management Negotiating Committee in March of '85'' (Tr. 4604–4605 12/5/91).

The Company and the Sun-Times continued their coordinated bargaining after the Union, Printers, and Mailers gave the Company notices of a Sunday midnight, July 7 strike deadline (R. Exh. 21; Tr. 1269–1273 2/4/87). On that Sunday evening, Company President Charles Brumback and the Sun-Times president met with a vice president of ITU (the Printers' International). With an obvious purpose of delaying the strike in the hope of reaching settlements with the three unions, Brumback and the Sun-Times president agreed that the CNPA would resume negotiations with the Printers. (Tr. 4613–4614 12/5/91, 4980–4981 12/9/91.) At that time the Printers local was a party to multiemployer bargaining with the Company and the Sun-Times through the CNPA, but negotiations had been suspended since an impasse had been reached in September 1984 (Tr. 1167, 1188 12/4/67; 5255 12/11/91).

This agreement to resume the CNPA-Printers negotiations did contribute to the decision to delay the strike. The Union ''held back on the strike in hopes that this was a harbinger of good things to come'' (Tr. 5534–5535 7/7/92). The delay enabled the Company and the Union to engage in 3 additional days of off-the-record bargaining before the strike began on July 18.

2. On the part of the Union

a. *The setting*

In its separate negotiations with the Union, the Company proposed the exclusion of supervisors (discussed above) and other major changes in the expiring 1979 CNPA agreement.

One of those proposed major changes was the Company's ''number one priority,'' to stabilize the work force by eliminating referrals from the Union's call room (Tr. 2317 12/13/88). Another was to add a new classification of associate pressman, who would be paid 55 percent of the journeyman rate (G.C. Exhs. 25 pp. 3–5, 49 pp. 6, 9; Tr. 1116 12/1/88; 3717, 3722–3723 1/18/89).

For over 4 months there was little progress in the negotiations. But when the ''popular Production Vice President'' Bell entered the negotiations, it was ''an uplifting of spirits'' for the union negotiators, who ''thought we would get something settled'' (Tr. 5543 7/7/92). Beginning on June 20, both the Company and the Union demonstrated a sincere desire to compromise and avoid a strike.

The stakes were high on both sides. Bell, who had the responsibility of keeping the presses running (Tr. 2440 1/20/88), realized that trained pressmen were not available to replace the 208 journeyman pressmen. The Union realized that the journeymen, virtually all of whom had guaranteed working-life job security (Tr. 4929 12/9/91), could jeopardize their job security by striking.

In their efforts to reach an agreement, the parties held off-the-record bargaining sessions that sometimes lasted into the early morning hours. Instead of bargaining from the parties' previous proposals, they took a ''different approach'' and began bargaining on an agreement to extend and amend the 1979 CNPA agreement (Tr. 3808 1/18/89). As tentative agreements on various issues were reached during the off-the-record discussions, the Company incorporated them in a proposed ''Agreement to Extend and Amend'' (Tr. 4565 12/5/91; R. Exhs. 101, 104, 109; G.C. Exh. 189), from which the parties would continue to bargain.

As a major concession by the Company, in addition to its concession on supervisors, the proposed extension agreement omitted any reference to associate pressmen. As a major concession by both the Company and the Union (Tr. 4828 12/6/91), the proposed agreement contemplated a complete elimination of referrals from the call room in exchange for a ''sub-line of 50 journeymen from the call room'' and a backup sub-line group of 25 or 50 call-room journeymen. The compromise would enable the Company to stabilize its work force with regular part-time journeyman pressmen (Tr. 4929 12/9/91).

Despite substantial progress made in the off-the-record discussions, the parties failed to agree on all the issues as a package (Tr. 2539 1/20/88).

b. *CFL Unity Council*

Since 1981 Edward Brabec, the (now deceased) president of the Chicago Federation of Labor (CFL), had been holding luncheon meetings of a so-called unity council at the Como Inn. It was a ''loosely knit group'' of all ''newspaper unions'' and ''related mechanical unions'' from ''the [Newspaper] Guild on top to the drivers [Teamsters] on the bottom.'' Brabec was seeking cooperation among the unions

(who were ''not always compatible'') in their dealings with the newspaper publishers (Tr. 1170–1172, 1175, 1213 12/4/87; 4264–4267 12/3/91; 5513–5514, 5538 7/7/92.)

In December 1984, when the Company was planning a 25-percent cut in sick pay benefits, the unions met and authorized Brabec to intercede on their behalf. Brabec succeeded in getting Company President Brumback to invite all the unions to a January 21 meeting, where Brumback agreed to postpone the cut in benefits until August 1. (Tr. 4250–4255 12/3/91, 5513 7/7/92.)

Meanwhile, in bargaining directly or through the CNPA, the Company was making similar proposals to all the unions as their agreements came open (Tr. 4256–4257, 4270 12/3/91; 5112–5113 12/10/91).

On March 8 and 19, the unity council (before it was formally named the Chicago Newspaper Union Employees Unity Council for announcing an April rally) met and decided to ''attend each other's negotiations'' with the Company and the CNPA. (I refer to this unity council, representing about 10 local unions, as the CFL Unity Council to avoid confusion with the Strike Unity Council, discussed below.) Those attending these CFL Unity Council meetings in March, besides the Union, included IBEW #134, Machinists #126, Mailers, Paperhandlers #2, Photo Engravers #458, Printers, and Teamsters #706. (Tr. 4284–4285 12/3/91; R. Exh. 98 p. 847.) (The evidence does not disclose whether officers from Newspaper Guild #71 and Stereotypers #3, as well as Operating Engineers #399, Tr. 4251 12/3/91, 5112 12/10/91, also attended the March meetings.)

Representatives of five of the CFL Unity Council unions (Mailers, Newspaper Guild, Paperhandlers, Printers, and Stereotypers) attended the Union's negotiations between March 27 and April 9. Mailers President John Philbin attended the four meetings on March 27–29 and April 9. Newspaper Guild Executive Director Jerry Minkkinen attended March 27 and April 9 and Charles Sturzyvski March 28. Paperhandlers President William Roberts attended the four meetings. Printers Vice President Steven Berman attended March 27 and 28 and Robert Branick March 29 and April 9. Stereotypers Secretary-Treasurer Richard Bee attended March 27–29. (R. Exh. 25 pp. 14, 18, 22, 25.)

In April, CFL President Brabec chaired weekly meetings of the CFL Unity Council, planning the April 28 rally. Besides the Union, the local unions represented in these meetings included the IBEW, Machinists, Mailers, Newspaper Guild, Paperhandlers, Photo Engravers, Printers, Stereotypers, and Teamsters. (Tr. 1221–1224 12/4/87; R. Exh. 98 p. 849.)

CFL Unity Council's rally announcement, using the council's new formal name, reads in part (R. Exh. 17):

> CHICAGO NEWSPAPER UNION EMPLOYEES UNITY COUNCIL *MASS MEETING ALL* UNION MEMBERS EMPLOYED AT THE CHICAGO TRIBUNE AND CHICAGO SUN-TIMES
>
> Date: SUNDAY, APRIL 28, 1985
>
> . . . .
>
> MEETING OF *ALL* UNION MEMBERS EMPLOYED AT THE CHICAGO TRIBUNE AND CHICAGO SUN-TIMES TO DISCUSS:
>
> Update on status of ongoing, difficult negotiations
>
> Proposals by management to weaken or destroy longstanding contract provisions, protections, and practices
>
> Potential impact if such proposals are effected
>
> Strategies to counter management's effort to destroy your contract rights
>
> THIS IS THE FIRST MEETING OF ITS KIND—THE FIRST TIME ALL UNION EMPLOYEES WILL MEET TOGETHER TO SUPPORT AND EXPRESS UNITY FOR THOSE EMPLOYEES FACED WITH GREATLY REDUCED WORKING CONDITIONS.

Listed at the bottom of the announcement are the names of Printers President Dave Donovan and Pressmen President Robert Hagstrom as co-chairmen and CNG (Chicago Newspaper Guild) Executive Director Jerry Minkkinen as secretary. The last line reads: ''FOR INFORMATION CALL: CNG #17 236–4924.''

President Donovan's announcement of the rally in the Printers' April ''Reporter'' (R. Exh. 121) reads in part:

> It has taken four years for the Unity Council to take shape. With the help of Chicago Newspaper Guild (CNG) Executive Director Jerry Minkkinen, the new organization embraces *all* Union members employed in the Chicago Sun-Times and the Chicago Tribune. Many meetings of the fledgling group have taken place at which views were exchanged and discussed. The Unity Council meeting is scheduled under the guidance of Chicago Federation of Labor-Industrial Union Council President Ed Brabec.

On April 29, Brabec met again with the CFL Unity Council at the CFL and wrote Brumback the following letter (R. Exhs. 18, 98 p. 849; 1236–1239 12/4/87):

> On April 28, 1985, a joint meeting was held of the members of *all* AFL–CIO affiliated unions who are employed at the Chicago Tribune.
>
> At this informational meeting reports were given of the status of negotiations with the various unions. The lack of progress in the negotiations was a matter of deep concern to the members.
>
> *The officers of these unions have authorized me to inform you that they must have acceptable agreements by June 1, 1985, as they are obligated to report to their members with a recommended course of action.* It is the sincere desire of these officers to reach mutually acceptable agreements through collective bargaining by this date.
>
> We are asking that you *meet jointly with the officers of the unions and me* to discuss ways of expediting the collective bargaining procedures which have been unsuccessful to date. I would appreciate hearing from you today on this matter. [Emphasis added.]

On May 10, Brumback replied (G.C. Exh. 228), stating ''All of us appreciate your taking time to help us with our labor relations.'' He offered to meet individually with the presidents of four of the unions (the Union and the Mailers, Paperhandlers, and Printers), but refused a joint meeting.

On May 13, Brabec and the CFL Unity Council met to discuss Brumback's May 10 written response to Brabec's

April 29 letter. The council asked Brabec to meet with Brumback, to express the council's decision not to meet with Brumback on an individual basis, and to request Brumback again to meet with the CFL Unity Council. That afternoon Brabec reported back that Brumback was adamant in his position (refusing to meet with the council) and that Brabec ''reaffirmed to Mr. Brumback that the June 1 date still stood.'' (Tr. 1241–1244, 1256–1257, 1266 12/4/87; R. Exh. 19.)

(Discussed later is Brabec's unauthorized statement to Brumback in their May 13 meeting that ''all the unions must have a contract before any union will settle and that . . . Brabec has the support of all of the unions.'')

The CFL Unity Council met weekly at the CFL on May 6, 13, and 23 ''to discuss the problems at the Chicago Tribune and to plan for future eventualities, if needed'' (R. Exh. 98 p. 851 insert; 4299–4300 12/3/91). On May 23, CFL Unity Council Secretary Minkkinen sent a letter to all the council members, stating in part (R. Exh. 20; Tr. 1268 12/4/87):

> Following is a list of strike committees and a thumbnail description of the duties of each. As we know, the potential for a confrontation with the Chicago Tribune is looming larger by the day. By action of 5/23/85, we have decided to begin naming *members of each union* to these committees, in order to prepare ourselves for such an eventuality. [Emphasis added.]

Minkkinen requested the selections to be completed and returned to him at the office of the Newspaper Guild if possible by May 31. The list of nine strike committees included a ''*Policy Committee*—Comprised of the leadership of each of the unions involved in the strike, together with CFL representatives.''

Hagstrom made no committee selections at that time (Tr. 1172 12/4/87, 4301 12/3/91). The Union's vote for permission to set a strike date was not held until June 9 (R. Exh. 98 p. 852). On May 31, however, he attended a meeting called by CFL President Brabec and CFL Unity Council Secretary Minkkinen of ''Newspaper Unions to discuss strike headquarters and committees, if needed'' (R. Exh. 98 p. 851; Tr. 1233 12/4/87).

The CFL Unity Council held meetings at the CFL also on June 17 and 24 and July 1 and 5 ''to determine committee selections and strategy'' (Tr. 4315–4316 12/3/91; R. Exh. 98 p. 854 insert). On June 17, the Union and the Printers and Mailers set the July 7 strike deadline, which the CFL Unity Council announced in a press release prepared by Co-Chairman Hagstrom (R. Exh. 14; Tr. 1168–1169 12/4/87). The CFL Unity Council meetings held before that strike deadline were attended by 12 or 15 persons (Tr. 4323 12/3/91). The evidence does not reveal, however, how many of the other CFL Unity Council unions were in attendance or how many, if any, had made strike committee selections in anticipation of a strike.

The evidence does reveal that none of the other CFL Unity Council unions decided to strike. Hagstrom testified: ''Unfortunately'' only the three unions went on strike (Tr. 1233 12/4/87). The Company reached agreements (through the CNPA) with all the other unions—the agreement with the Paperhandlers through interest arbitration (Tr. 3691 12/13/88, 4615–4616 12/5/91, 4923 12/9/91, 5112–5113 12/10/91).

The CFL Unity Council was continuing to hold luncheon meetings at the Como Inn (Tr. 5243–5244 12/11/91; 5381–5384, 5538 7/7/92; 5574 7/8/92).

c. *Strike Unity Council*

When none of the other CFL Unity Council unions decided to strike, the Union and the Printers and Mailers formed the Strike Unity Council shortly before the July 7 strike deadline (Tr. 1170–1172, 1186–1191 12/4/87; 4275 12/3/91).

In forming the Strike Unity Council, the three unions generally followed the list of committees in the May 23 letter (R. Exh. 20) that Minkkinen sent to all CFL Unity Council members. They did not, however, establish a policy committee with CFL representatives. They appointed only members of the three unions to the various committees. The three local presidents became the steering (or policy) committee. Initially, each of the presidents appointed a strike coordinator for his union. On August 27 the presidents, as the steering committee, appointed two strike coordinators to whom all committee chairmen would report. (Tr. 1195–1198 12/4/87, 4361 12/3/91; R. Exh. 96.)

I note that there is considerable confusion in the record resulting from the fact that both the CFL Unity Council and the Strike Unity Council used the identical formal name, Chicago Newspaper Union Employees Unity Council (Tr. 1170–1172, 1189, 1212, 1222–1225, 1239, 1278–1280 12/4/87). As examples: that formal name was used on CFL Unity Council's April 28 rally announcement, as quoted above (R. Exh. 17), which shows Printers President Donovan and Pressmen President Hagstrom as co-chairmen, Newspaper Guild Executive Director Minkkinen as secretary, and the Newspaper Guild telephone number as the number to call for information. The same formal name was used on Strike Unity Council's ''Dear Advertiser'' and ''Don't Buy It'' boycott literature (R. Exhs. 23, 100 p. 5), both of which identify the three unions as the council and show the address and telephone number of the strike headquarters.

The three unions made equal contributions to the Strike Unity Council to maintain a strike headquarters, print picket signs, publish strike literature, conduct rallies, and engage in other strike activities (Tr. 1193, 1207 12/4/87, 4461–4471 12/4/91).

The Strike Unity Council's steering committee held its meetings at the strike headquarters, except when they met at the CFL for a special purpose, such as making a press release (Tr. 4361–4362 12/3/91, 4389–4390, 4424 12/4/91). CFL President Brabec was able to command more media attention. He acted as a spokesman from time to time because ''he could get the audience.'' (Tr. 1198–1199 12/4/87, 4360–4362 12/3/91, 5545 7/7/92.)

d. *Separate bargaining*

Although the three unions participated in the CFL Unity Council, set the initial strike deadline, postponed the strike, and ran the strike through the Strike Unity Council—all lawful coordinated activities—there was very little coordinated bargaining.

With one exception, the only times representatives from the Printers and Mailers attended the Union's negotiations were when they and representatives from three other CFL Unity Council unions (Newspaper Guild, Paperhandlers, and Stereotypers) attended bargaining sessions over 3 months before the strike. This one exception was when Printers President Donovan and Mailers President Philbin attended on June 19, the day *before* the Company and the Union began engaging in 9 days of productive off-the-record bargaining. At this June 19 meeting, as Labor Relations Manager Howe's bargaining notes show (G.C. Exh. 176 p. 348), ''Veon says if they can be of help to us in negotiations, we're glad to have them.''

The evidence is clear that these visiting representatives from other unions officers were *nonvoting* members, mainly observers, although the Union stated that they had the full right to speak. None of them ever presented a proposal on behalf of the Union. (Tr. 1202 12/4/87, 4591–4594, 4628 12/5/91, 4825 12/6/91, 5241–5242, 5279 12/11/91; G.C. Exh. 176 p. 348.)

Concerning their role, Kulas testified on direct examination about an incident in the negotiations on March 28. When the parties were discussing manning, Philbin said the position the Company was taking was very similar to what was going on in the Mailers negotiations. Kulas testified that Veon asked if they were not here to discuss the Union's contract, and Philbin said ''no, we are here to discuss *all of the matters, all unions* [emphasis added],'' referring to ''the *Mailers and the other unions without a contract* [emphasis added]''—without revealing any response from the Union. (Tr. 4635–4636 12/5/91.)

On cross-examination Kulas conceded that when Veon objected, Hagstrom (disputing Philbin's statement) responded ''something like'' they ''are here to discuss [the Union's] negotiations'' (Tr. 4780–4781 12/6/91). Similarly, Howe later testified that Hagstrom responded ''no, we are here to negotiate [the Union's] negotiations'' (Tr. 4941–4942 12/9/91).

I note that four times in its brief, the Company *omits* Hagstrom's response, although twice citing a page reference to Howe's testimony. When reviewing the facts, the brief states (at 8): ''Philbin said no, they were there to discuss *matters involving all of the unions without a contract* [emphasis added].'' Later in the brief, when contending that ''The manner in which the Union conducted its negotiations is additional evidence of unlawful coordinated bargaining,'' the Company argues (at 49, 50 fn. 6, 52):

> When the Company objected to a discussion of the Mailers negotiations, Philbin said that they were not just there to negotiate the Pressmen's contract, they were there to negotiate *all of the contracts*.
>
> . . . .
>
> . . . In the negotiations, Philbin said that they were not just there to negotiate the Pressmen's contract, but to negotiate *all of the contracts*.
>
> . . . .
>
> Philbin even stated in Pressmen negotiations that the representatives were there to discuss *all of the contracts*. This conduct is additional evidence of unlawful coordinated bargaining. [Emphasis added.]

Yet this incident occurred early in the negotiations, Hagstrom promptly corrected Philbin, and this was the first and only time in all the negotiations that an issue in another union's negotiations was ever mentioned.

In their separate negotiations, the Company and Union bargained only on their own contractual issues and never on any Printers or Mailers issues (Tr. 4505 12/4/91).

D. *Union Assurances*

1. Early morning, July 8 meeting

The Union was already demonstrating its eagerness to reach an agreement and avoid a strike by joining the Company in the off-the-record discussions after Vice President of Operations Bell entered the negotiations.

Then about 2 o'clock Monday morning, July 8—2 hours after the Sunday midnight strike deadline—the Union expressly gave an assurance to the Company that it was eager to sign an agreement (without regard to the Company's negotiations with other unions).

The Company and Union were making substantial progress in their latest off-the-record negotiations that had extended from Saturday evening, July 6, into early Sunday morning and (after the Company met with the Mailers Sunday afternoon) had resumed Sunday evening, July 7. That evening was when Company President Brumback and the Sun-Times president met with an ITU vice president and agreed to resume negotiations with the Printers.

At 10 p.m., 2 hours before the strike deadline, the Union submitted ''on the record'' a proposal (R. Exh. 107) that also placed on the record its early Sunday morning off-the-record proposal (R. Exh. 105), in a further effort to reach an agreement and avoid a strike. It also agreed to ''stop the clock'' to continue bargaining beyond the midnight deadline and scheduled another meeting to be held after the Company met again with the Mailers. Before midnight it received the news, hopefully ''a harbinger of good things to come,'' that the CNPA would resume negotiations with the Printers. (Tr. 4675 12/5/91, 4978 12/9/91, 5145 12/10/91, 5220–5221 2/11/91, 5534–5535 7/7/92.)

The Union did follow the Mailers and met with the Company about 2 o'clock Monday morning, July 8, after the Company had prepared its oral response to the Union's 10 p.m. on-the-record proposal (R. Exh. 107; Tr. 5222–5224 12/11/91). As Howe testified, both the Company and the Union were saying ''we think we can settle this.'' Howe admitted (Tr. 4984 12/9/91): ''I remember Mr. DeVito for sure saying *we want to settle this*.'' (Emphasis added.)

At 2:20 a.m., after receiving this explicit assurance from the Union, the Company began giving its oral response. Just before 2:30 a.m. (Tr. 4984 12/9/91; G.C. Exh. 176 pp. 382–383), it reached the supervisor issue.

As found, the Company refused to agree with the Union's on-the-record proposal for a provision that excluded supervisors, with an unqualified prohibition against them performing bargaining unit work (R. Exh. 105 par. c, p. 2): ''Supervisors—excluded from bargaining unit—shall not perform bargaining unit work.'' The Company did make a significant concession that the excluded supervisors ''shall not perform bargaining unit work.'' It added, however, the qualification: ''but shall perform [undefined] customary supervisory duties.''

I discredit Howe's claim (Tr. 4985 12/9/91) that the Company ''*backed all the way off* and proposed to the Union

what they had stated to us that they wanted [emphasis added]'': that supervisors ''would be excluded from the contract and not perform bargaining unit work.'' I also discredit Kulas' claim (Tr. 4685 12/5/91) that when the Company made its oral offer on supervisors, that was ''when [the Union] wanted to go back and meet with the other unions.'' Instead, the Company then proceeded to give the remainder of its oral response and, despite the late hour, the parties continued negotiating ''Absolutely'' in ''earnest'' to reach an agreement (Tr. 5228 12/11/91).

They were near agreement on the major call-room issue, disagreeing on the number of 25 or 50 journeymen to be selected from the call room for the backup subline group (Tr. 4845 12/6/91, 4992 12/19/91; G.C. Exh. 176 p. 389). Despite their efforts to reach an agreement, however, the parties admittedly (Tr. 4993 12/9/91, 5113 12/10/91) remained apart on some ''important or major issues.''

Finally at 3:15 a.m. the Union decided to go next door to the hotel where the Printers and Mailers were waiting and conferred with them on the status of the negotiations (Tr. 4522 12/4/91, 4986–4994 12/9/91, 5090 12/10/91, 5228–5229 12/11/91). (The Company and Mailers had scheduled another bargaining session to follow the Union's negotiations that morning, Tr. 4527 12/4/91.)

DeVito's bargaining notes (Tr. 5150 12/10/91) state the reason for adjourning the negotiations at that particular time: ''Veon wished to draft language in the amended areas. We stated we weren't interested at this hour and decided to adjourn at 3:15.'' DeVito credibly explained on the stand that Veon employed the practice of submitting a complete draft. ''The hour was late. We had a very tedious day and everybody was under severe strain . . . . We had been going all day long and we were just basically exhausted. And I believe they were, too.'' (Tr. 5150–5251 12/10/91.)

In view of the progress that had been made in the negotiations and the favorable news that the Company and Sun-Times had agreed to resume bargaining with the Printers (perhaps indicating further company concessions), the Union agreed with the Printers and Mailers not to strike that morning and to negotiated on a day-to-day basis. DeVito credibly testified that ''we . . . extended the deadline because we were all under the impression we could come to a settlement after the first deadline had been reached and we did not strike.'' (Tr. 4520–4524 12/4/91, 5576 7/8/92.)

DeVito telephoned the Company. He notified them that the strike was being postponed and the three unions scheduled bargaining dates: the Mailers that afternoon and on July 9, the Union on July 10, and the Printers on July 11. (Tr. 5152–5153 12/10/91, 5229 12/11/91.)

2. July 10 meeting

The Union again assured the Company that it desired an agreement on July 10 at the next bargaining session after the strike was postponed.

Near the beginning of this meeting, before presenting its revised proposed ''Agreement to Extend and Amend'' (R. Exh. 109; G.C. Exh. 189; Tr. 4994 12/9/91), the Company specifically asked ''if the Union was in a position to go ahead and sign off'' on an agreement (without agreements first being reached between the Company and the Printers and Mailers).

This question arose in the context of (a) the Union, Printers, and Mailers having sent virtually identical strike notices on June 17, setting the same strike deadline (R. Exhs. 14, 21; Tr. 1271–1273 12/4/87, 4498–4499 12/4/91) and (b) the Union having from time to time inquired about the status of the Mailers' negotiations and commented on the absence of any negotiations with the Printers (Tr. 4504–4509, 4513, 4519–4520 12/4/91, 4965–4966 12/9/91, 5151–5152, 12/10/91, 5217–5220 12/11/91).

DeVito's bargaining notes read as follows (Tr. 5231–5232 12/11/91):

> Bob [Hagstrom] asked Veon about Mailers meetings. Veon responded no significant change in their negotiations.
>
> George [Veon] asked *if we are in a position to sign off*. Bob [Hagstrom] and I responded that *if we secure our issues*, that is possible. [Emphasis added.]

Hagstrom credibly recalled (Tr. 5535 7/7/92) that ''we told him . . . that we were in there for [Pressmen's Union] No. 7 and *if we could get an agreement, we have got an agreement* [emphasis added].''

After both Hagstrom and DeVito gave this assurance, the Company presented its off-the-record written proposal, incorporating its early Monday morning oral proposals, and the parties resumed bargaining ''where they left off'' (Tr. 5091 12/10/91). That afternoon, July 10, the Union submitted a five-page proposal (R. Exh. 110; Tr. 4995–4996), again ''on the record.''

Howe's July 10 bargaining notes (G.C. Exh. 176 pp. 384–387) conclude:

> Discussion on what transpired [at] Sunday meeting.
> If unions [had] extended deadlines before midnight and [if] we were informed of that, we could have avoided a lot of the chaos.
> [Adjourn to] July 15 and July 16 (9:30 a.m. at CNPA).

At that time, there was no complaint that they had not negotiated even later that Monday morning.

3. July 15 meeting

At the beginning of the July 15 meeting, before another full day of bargaining, the Company sought and received further assurance from the Union.

Howe's bargaining notes read (G.C. Exh. 176 p. 388):

> Veon says . . . . Not sure where we are and if you want to settle. We've been told that you *won't settle until others settle*.
>
> Hagstrom says *have we ever told you that*?
>
> Veon says *your representative and agent, Ed Brabec, told us that*.
>
> Also, other two unions won't do anything until Aug. 20. [Emphasis added.]

Similarly, Kulas read from his bargaining notes (Tr. 4698–4700 12/5/91):

> MR. VEON: I am not sure where you are. We have been told that we *won't get a contract until all unions do*.

> MR. HAGSTROM: *Did we tell you that*?
>
> MR. VEON: *Your spokesman, Brabec did*. It appears the ITU Unions [Printers and Mailers] want to wait until August 20th. And then there is talk about what happened at the Printers meetings and Mailers meetings and how they stall.
>
> Then *DeVito asked what is August 20th*, and Veon says that is [when] the ballots [are to be] counted in [a proposed] merger. At loss at why you support that. If you are, there is a question, we need to know that.
>
> DeVito, he talks about getting to the truth and my understanding is the Mailers made substantial movement and you firmed up. [Emphasis added.]

I note that when Hagstrom was shown the bargaining notes of employee Warren, he recalled (Tr. 4535–4536 12/4/91) that DeVito also responded that the Printers had made a proposal (in their negotiations on July 11)—further indicating that DeVito was not aware of any stalling until August 20.

Although the Union's assurance is not shown at that point in either Howe's or Kulas' bargaining notes, I discredit Kulas' claim that the Union did not ''say anything at that time about we are here to get an agreement'' (Tr. 4702 12/5/91) and Howe's claim that ''They didn't say anything more about it'' (Tr. 5003 12/9/91). To the contrary, Hagstrom credibly testified (Tr. 5535 7/7/92):

> [W]e told [Veon] at all times, that we were in there for [Pressmen's Union] No. 7 and *if we could get an agreement, we have got an agreement*. [Emphasis added.]

(I observed that Hagstrom could not remember as many details when he testified at the remand hearing in 1991 and 1992 as he could when he testified before in 1987 and 1988 at the trial. He again, however, ''impressed me most favorably by his demeanor on the stand as a sincere witness, doing his best to recall accurately what occurred.'')

Hagstrom's testimony, that the Union again gave the Company the assurance that it would sign if an agreement could be reached, is confirmed by Kulas' own bargaining notes. Kulas read this part of his notes when he was testifying about a proposed tradeoff near the close of the July 15 negotiations (at 5 p.m., as shown by Howe's notes, G.C. Exh. 176 p. 401). Kulas testified (Tr. 4708 12/5/91):

> Q. What did Mr. Veon say before he made this movement on this proposal about the changing of the zipper clause for this other issue?
>
> A. My notes indicate that he said we are taking [the Union] *at their word that we can reach agreement*, and that maybe we can accommodate them. [Emphasis added.]

I consider it obvious that the Union must have given such an assurance in response to Veon's inquiry (about CFL President Brabec's statement to Company President Brumback on May 13 that ''all the unions must have a contract before any union will settle''). Otherwise, the parties would not have then spent the full day bargaining on the unresolved issues, as shown by Howe's bargaining notes (G.C. Exh. 176 pp. 388–401).

Although the Union did not dispute Brabec's statement ''flat out'' (Tr. 5536 7/7/92), I find that by giving the Company this assurance (that the Union would sign if an agreement could be reached), the Union was in effect repudiating Brabec's statement, which was made over 2 months earlier and which the Company had been ignoring until the July 15 meeting.

Regarding the status of the negotiations, as found, Kulas' bargaining notes state that at the July 15 meeting, DeVito said there was no agreement on 15 of 25 items, 8 of which were ''tough ones'' (Tr. 4704 12/5/91). Howe's notes show that this occurred between 3:44 and 4 p.m. (G.C. Exh. 176 pp. 398–400), after hours of bargaining on many issues.

At the next meeting on July 16, the parties spent most of the time in an unsuccessful attempt to trade off various issues (G.C. Exh. 176 pp. 402–405; Tr. 4718 12/6/91), further demonstrating that both the Company and the Union were sincerely seeking an agreement.

4. July 30 meeting

The Union assured the Company at the July 30 meeting (nearly 2 weeks after the strike began) that it was eager to sign an agreement.

By that time, the Union obviously was in a poorer bargaining position. Kulas testified ''I would say yes,'' the Company had ''really won the strike'' at that stage ''because we weathered the strike . . . we didn't miss an edition and we were able to get the paper out and distributed'' (Tr. 4847 12/6/91).

Although the Company was still hoping that the strike could be settled and was hiring only temporary replacements for the first month, it had (lawfully) withdrawn its prestrike off-the-record concessions, such as those on supervisors and the call room, and had reinstated its proposal for a new classification of associate pressman to be paid 55 percent of the journeyman rate (Tr. 4846 12/6/91; G.C. Exh. 49 p. 7).

It was under these circumstances that the Union expressed its eagerness at the July 30 meeting to settle the strike and return to work. Howe's notes show that after several hours of bargaining, when Veon asked Hagstrom, ''What are the important issues in these negotiations [to] get it resolved?'' there was an immediate reply (G.C. Exh. 176 p. 438; Tr. 3823 1/18/89):''Hagstrom says the important issue is to *get the people back to work*.'' (Emphasis added.)

The evidence shows that Hagstrom took this same position, showing independent decision making, when ''making a statement about settlement'' at a (CFL Unity Council) meeting of Tribune unions at the Como Inn. Printers Vice President Berman (who referred to these meetings as ''Presidents' meetings'' or ''Unity meetings'') credibly recalled (Tr. 5243–5246 12/11/91, 5381–5384 7/7/92) that

> Hagstrom stated at one of the meetings I attended at the Como Inn that *if anybody could settle, go ahead and settle*. [Emphasis added.]

Recalling more fully what he stated at the meeting, Hagstrom credibly testified that at the Como Inn (Tr. 5538–5539 7/7/92):

> [W]e were questioned whether or not there would be a gentleman's agreement, whether overt or covert, that all

> return . . . one back, all back. And it was the opinion of my local union and myself, and I so stated that, ''*If you get a settlement, you go back*. And anybody that can get a settlement, *it is going to be a breakthrough for all of us*.'' [Emphasis added.]

I find the evidence clear that after the July 30 meeting, the Union demonstrated in the negotiations that it was seeking a settlement, without regard to the Printers or Mailers negotiations. Howe recalled that at the October 24 meeting, DeVito ''made a long statement . . . stating that why don't we go back to where we were . . . in the off-the-record type negotiations.'' The Company refused, responding ''that we had proposals on the table . . . and we wanted to continue to negotiate on those points.'' (Tr. 3833 1/18/89.)

When Kulas was asked if the Union ever raised issues that concerned the other two unions after the strike started, he expressed uncertainty about whether there was ever any mention of their bargaining. He answered (Tr. 4855 12/6/91) that he had reviewed his bargaining notes and ''I vaguely remember a comment made by Mr. DeVito, and *I think* [emphasis added] it was made after the strike, about progress at the Mailers Union. If you want me to, I will gladly look for it.''

Howe expressed similar uncertainty (Tr. 5628 7/8/92):

> Q. After the strike at the bargaining table did [the Union] ever bring up the problems that [the Mailers] or [the Printers] were having getting the contract with the [Company]?
>
> A. I *think* they may have. I would have to review all my notes and correspondence. I know there was discussion because I know there was also in the other negotiations with the Mailers. [Emphasis added.]

Neither Kulas nor Howe checked his bargaining notes to point out a single instance.

Finally, when the Union learned in January 1986 that the Regional Director was issuing a complaint against the Company for unlawfully bargaining to an impasse on November 13, the Union did not hesitate in deciding to make an unconditional offer to return to work—without regard to the status of the Printers and Mailers negotiations. Then when the Union advised the other two unions of its decision, it ''didn't bother'' the Printers ''because they were planning to do the same thing.'' But Philbin ''was extremely put out. He thought it put the Mailers in a very bad light,'' because the Printers also had unfair labor charges pending against the Company, but ''Philbin had none.'' (Tr. 4427–4428 12/4/91, 4580–4584 12/5/91, 5542 7/7/92.)

Nothing was said at that time about any agreement that ''Nobody goes back until everyone goes back.''

E. *Undisputed Facts*

In evaluating the Company's affirmative defense that the Union was engaged in ''unlawful coordinated bargaining,'' I take into consideration the following undisputed facts:

It is undenied, as Hagstrom credibly testified, that the Union never said that no union would sign a contract until they all had a contract (Tr. 1203 12/487).

Kulas testified that he never heard the Union say ''we won't sign a contract unless the other two unions sign off'' (Tr. 4854 12/6/91).

Howe admitted that the Union did not state after the strike ''we are never going to sign a contract unless [the Printers and Mailers] reach their contract'' (Tr. 5627–5628 7/8/92).

Howe admitted that before the Union offered to return to work on January 30, 1986, he never heard anyone say there was an agreement among the unions to all return to work at the same time (Tr. 5598 7/8/92).

F. ''*Unlawful Coordinated Bargaining*''

1. Admitted ''desperate attempt'' to reach agreement

Perhaps inadvertently, the Company in effect acknowledges the overwhelming evidence that the Company and the Union exerted sincere efforts during their off-the-record discussions to reach an agreement.

In its brief (at 53) the Company refers to ''the parties *desperate attempt to reach an agreement* prior to the original, July 7, strike deadline.''

Yet the Company asserts (at 35, 60) that the conclusion is ''inescapable'' that the Union and the Printers and Mailers ''conspired to engage in unlawful coordinated bargaining,'' whereby ''one union would not seriously attempt to get a contract unless the other two did.''

2. Contentions of the parties

The General Counsel contends in his brief (at 35) that the Company ''had access to all three unions' meeting minutes and innumerable subpoenaed documents, but was unable to come up with any reference'' to an agreement that the Union would not settle unless the Printers and Mailers also settled. ''There simply was no such agreement.''

The Union contends in its brief (at 1, 6–7) that the Company's claim that there was such an agreement is a ''Conspiracy Fantasy'' and that the Union's prestrike bargaining ''demonstrated a sincere desire to reach agreement.''

The Company contends in its brief (at 41–42) that under Board law, the Union is bound by the statement made by its agent, CFL President Brabec, on May 13. It contends (at 42–43) that Brabec stated

> directly and unequivocally to the President of the Company that none of the unions would settle until they all settled. His statement is a blatant admission of unlawful coordinated bargaining.
>
> Since unlawful conspiracies are not often announced to the party being conspired against, it is hard to imagine more clear and convincing proof of unlawful coordinated bargaining. The statement by Brabec is certainly the *proverbial smoking gun*. [Emphasis added.]

The Company—confusing the CFL Unity Council (consisting of about 10 local unions) with the Strike Unity Council (consisting of the three striking unions)—contends (at 45) that the Union and the Printers and Mailers formed the ''Unity Council'' by April 1 and because ''the Unity Council was formed, funded and directed by the three unions,'' it ''was an agent and acted on the authority of the Union.'' The Company contends (at 34) that acting through the the Unity Council, the three unions ''authorized Brabec to speak to the Company on their behalf.''

The Company also contends (at 39–40) that unity council statements and conduct ''are further proof of the Union's un-

lawful conduct'' and that ''the manner in which the Union conducted its negotiations is additional proof of the Union's improper conduct.''

The Company further contends that some of the coordinated activities, found above to be lawful, constituted ''unlawful coordinated bargaining.''

3. Hope, not reality

Hagstrom admitted (Tr. 1203, 1256–1259 12/4/87; R. Exh. 19 p. 2) that Brabec reported back to the CFL Unity Council on May 13 that he had told Company President Brumback in the meeting that afternoon that

> *all unions must have a contract before any union will settle* and that Mr. Brabec has the support of all the unions. [Emphasis added.]

The evidence is clear, however, that Brabec was expressing his hope, not a reality.

As found, since 1981 Brabec had been holding informal ''unity council'' luncheon meetings at the Como Club with the ''not always compatible'' newspaper unions, seeking cooperation among them in their dealings with the publishers. He spoke for them in arranging their January 21 meeting with Brumback, who agreed to postpone a cut in sick benefits. At meetings of the CFL Unity Council in March, the newspaper unions decided ''to attend each other's negotiations'' with the Company and the CNPA.

Brabec's unity endeavors were crowned on April 28 when the CFL Unity Council sponsored the first-time ''Mass Meeting'' of ''*All* Union Members Employed at the Chicago Tribune and Chicago Sun-Times.'' On April 29 Brabec sent a letter to Brumback, asking him to ''meet jointly with the officers of the unions and me'' and informing him that ''The officers of these unions . . . must have acceptable agreements by June 1, 1985, as they are obligated to report to their members with a recommended course of action.''

The CFL Unity Council, including Hagstrom, had authorized Brabec to send the letter. But the unions in the council *never* agreed, and they *never* authorized Brabec to tell Brumback, that all the unions must have a contract before any union would settle. (Tr. 1236, 1257 12/4/87; 5246 12/11/91; 5540, 5545–5546, 5552 7/7/92.)

Moreover, the evidence shows that neither the unions nor the Company took Brabec's statement seriously. All the unions, except the Union, Printers, and Mailers, reached agreements with the Company (through the CNPA). The Company, with one exception, never mentioned Brabec's May 13 statement in any of the negotiations. The one time was on July 15, the eighth day of the productive off-the-record discussions, when the parties were seeking to resolve the remaining issues separating them. Until then, the Company had ignored Brabec's statement to its president, even through the Union had been making references to the Mailers' negotiations and the absence of Printers' negotiations.

As found, Veon said at the beginning of that meeting that ''We have been told that we won't get a contract until all unions do'' and that ''Your spokesman, Brabec'' said that. After Hagstrom again assured the Company that ''if we could get an agreement, we have got an agreement,'' the parties continued their off-the-record bargaining, demonstrating their efforts to avoid a strike, without any further references to the Printers' or Mailers' negotiations. The following day they tried to break the deadlock by trading off various issues.

Obviously, the Company would not have engaged in the 9 days of off-the-record discussions if they had taken Brabec's earlier statement to Brumback seriously.

4. Two unity councils

The Company confuses the CFL Unity Council—which Brabec had been nurturing among all the newspaper unions for about 4 years, which sponsored the April 28 ''Mass Meeting'' of ''*All* Union Members Employed at the Chicago Tribune and Chicago Sun-Times,'' and which authorized Brabec to seek a joint meeting with Brumback and to set the June 1 deadline for reaching ''acceptable agreements''—with the Strike Unity Council, which the Union and the Printers and Mailers formed shortly before the July 7 strike deadline.

Using the single name, ''Unity Council,'' the Company asserts in its brief (at 45)—without the emphasized bracketed clarifications:

> By April 1, 1985, the Pressmen, Printers, and Mailers Unions had formed the [*CFL*] Unity Council [*rather than Brabec, as found*]. The [*Strike*] Unity Council was funded by contributions from the three unions.
>
> Hagstrom, Donovan, and Philbin, the three union presidents, were co-chairmen of the [*Strike*] Unity Council. [*As found, Hagstrom and Donovan were co-chairmen and Newspaper Guild Executive Director Jerry Minkkinen was secretary of the CFL Unity Council, whose telephone number was the Guild's number*.] They were also members of the [*Strike*] Unity Council's steering committee and policy committee.
>
> Throughout 1985 the [*Strike Unity Council's*] policy committee met on an average of twice a week [*although, as found, the Strike Unity Council was not formed until July*]. . . . Brabec directed the [*CFL*] Unity Council in planning the mass meeting held on April 28, 1985.

It was on the basis of this erroneous analysis of the evidence that the Company asserts in its brief (at 45 fn. 3) that because ''the Unity Council was formed, funded and directed by the three unions, including the Pressmen's Union, the Unity Council was an agent and acted on the authority of the Union.'' The Company further asserts (at 42) that ''Clearly, Brabec was an agent of the Unity Council and [the] Union when he told Brumback that all the unions had to have contracts before any union would settle.''

It was the multiunion CFL Unity Council that authorized Brabec to speak to Brumback, not the three unions' Strike Unity Council. Moreover, even if Brabec's May 13 statement to Brumback (that ''all unions must have a contract before any union will settle'') had been authorized and taken seriously, that would have indicated a broken commitment by the newspaper unions that none of them would sign a contract before all the unions settled—not an agreement between the Union and the Printers and Mailers that the Union would not settle until the other two unions settled. All the other unions, beside the Union and the Printers and Mailers, settled without a strike.

5. ''Exactly what the Union said it wanted''

The Company argues in its brief (at 54):

> Most telling of the Union's unlawful coordination with other unions is its conduct on the supervisory exclusion issue on July 7, 1985. Late in the evening, the Company orally proposed that supervisors would be excluded from the bargaining unit and would not perform bargaining unit work. This significant concession to *exactly what the Union had said it wanted* should have broken the logjam and perhaps led to an agreement. However, the Union's response was not one of immediate agreement. The Union did not even respond to the Company's major concession. Instead, the Union adjourned the meeting so it could go talk to the other unions. . . . This conduct by the Union shows that even concessions by the Company on major issues were not going to lead to a settlement unless the other unions also settled. . . . Thus, it was the coordinated bargaining, not individual contract items separating the parties, which was preventing the parties from reaching an agreement. [Emphasis added.]

Neither this version of the facts nor the conclusion is persuasive.

As found, when the Company made the oral proposal—not late in the evening but near 2:30 a.m.—that ''all such [excluded] supervisors shall not perform bargaining unit work,'' it added the qualification: ''but shall perform [undefined] customary supervisory duties.'' The Company refused to agree with the Union's proposal that omitted that qualification: ''Supervisors—excluded from bargaining unit—shall not perform bargaining unit work.''

Also as found, when the Company orally proposed the qualifying language, the Union did not leave the meeting: ''Instead, the Company then proceeded to give the remainder of its oral response and, despite the late hour, the parties continued negotiating . . . . Finally at 3:15 a.m. the Union decided to go next door to where the Printers and Mailers were waiting and conferred with them on the status of the negotiations.'' This occurred when ''Veon wished to draft language in the amended areas'' and the Union was not ''interested at this hour.'' DeVito credibly explained: ''The hour was late. . . . We had been going all day long and we were just basically exhausted. And I believe they were, too.''

From the credited evidence, I reach the opposite conclusion from the Company about the adjournment. The Union decided not to proceed with the strike that morning. It instead agreed with the Printers and Mailers to postpone the strike and negotiate on a day-to-day basis because (a) there was progress in the negotiations, (b) it had received the news that the Company and Sun-Times had agreed to resume bargaining with the Printers (perhaps indicating further company concessions), and (c) as DeVito credibly testified, ''we were all under the impression we could come to a settlement after the first deadline had been reached and we did not strike.''

Moreover, after another 3 days of off-the-record bargaining (on July 10, 15, and 16) and sincere efforts to reach an agreement by trading off various issues, a total of eight major issues remained unresolved. I conclude that the inability of the Company and Union to resolve these remaining major issues was the reason for the failure to reach an agreement, not coordinated bargaining.

6. Other arguments

The Company, in the absence of any testimony or documentary evidence that the Union and the Printers and Mailers had met and entered into an agreement that each would not settle until the other two unions settled, makes many factual contentions that I find unpersuasive.

All of these arguments ignore the obvious facts that the Union was eager to sign an agreement to avoid a strike and, when the Company was able to keep the presses running without the strikers, to reach a settlement and ''get the people back to work.''

a. *Nonvoting committee members*

The Company argues in its brief (at 49) that the attendance of representatives of the Printers and Mailers at the March 27 and 28 and June 19 meetings as bargaining committee members with ''full rights to speak'' is evidence of ''unlawful coordinated bargaining.''

It fails to mention that representatives from a total of five CFL Unity Council unions (Mailers, Newspaper Guild, Paperhandlers, Printers, and Stereotypers), as found, attended four meetings from March 27 to April 9 (early in the negotiations) and that Veon welcomed the Printers' and Mailers' representatives on June 19, stating he was glad to have them.

The Company does not explain how this obviously lawful coordinated activity (inviting nonvoting members to attend) has any relevance to the purported conspiracy that the Union would not settle unless the Printers and Mailers also settled. The brief at four places does argue that on March 28, Philbin stated that they were there to discuss or negotiate all the contract or matters involving all the unions without a contract. Each time, as discussed above, the brief omits Hagstrom's response, correcting Philbin and stating that only the Union's issues were to be discussed.

Also apparently irrelevant is the Company's argument (at 50) that Printers Vice President Berman was ''involved with other unions with respect to their strategy and negotiations,'' a reference to Berman's participation in the lawful coordinated action of the Union and the Printers and Mailers on the night of the July 7 strike deadline, when they decided to postpone the strike (Tr. 5273–5278 12/11/91).

b. *All to return together*

The Company argues in its brief (at 44–46) that the two following documents are proof of ''unlawful coordinated bargaining.''

(1) ''Secretary's Unofficial Notes—June 17, 1985 Executive Committee Meeting.''

June 17 was the date that the Union and the Printers and Mailers set the initial July 7 strike deadline (R. Exhs. 14, 21; Tr. 1271–1273 12/4/87, 4498–4499 12/4/91). According to these minutes of a 1 p.m. meeting of the Printers' executive committee on that date (R. Exh. 124), President Donovan reported that at a ''Unity meeting'' attended by DeVito and two ITU vice presidents, ''Agreement [was] reached that *all* [emphasis added] unions would return together.''

Neither Donovan nor either of the two ITU vice presidents was called to testify. DeVito (who again appeared on the stand to be an honest witness) credibly denied categorically that in any meeting he attended with the two ITU officials, there was ever an agreement reached that all unions would return together (Tr. 5571 7/8/92). When questioned about the minutes, he credibly testified (Tr. 5573–5575 7/8/92):

> I notice by the date that this preceded the strike and I am baffled by . . . what I read here because we hadn't even struck at that time and I don't know when this meeting took place. . . . I know that we had meetings together in unity at the Chicago Federation of Labor. We had sporadic luncheon meetings . . . where things were discussed on each other's negotiations and what progress was being made. At this particular time the [Printers] . . . were not in negotiations. . . . I know [the Union], we were negotiating on the premise that if we could come to a settlement that we would settle our contract and we said that during negotiations.
>
> . . . .
>
> Dave Donovan would envision a lot of things . . . he would say and do things that were erratic at times. We used to have spats . . . Dave what the hell are you doing we never said this, this never happened and different things.
>
> I personally don't take any stock in this. . . . It was never said by me and it was never said . . . that we would all go back or none would go back or whatever that is. Never. Never.

If Donovan's report were true, it would be valuable information for the membership, but none of the minutes of the membership meetings held by the Union and the Printers and Mailers reflects any agreement that all the unions would return together. Donovan's report, made only to his executive committee on the day he joined in setting a strike deadline with the Union and the Mailers (both of whom, unlike the Printers, were in negotiations), merely raises the suspicion that Donovan's purpose in reporting the purported agreement was to reassure his fellow union officials of the wisdom of the action.

Furthermore, I consider it unlikely that all the CFL Unity Council unions would be agreeing to return together when none of them—except the Union and the Printers and Mailers—was deciding to strike.

In view of DeVito's credited testimony and all the circumstances, I do not consider Donovan's report to his executive committee on June 17 to be persuasive evidence of either an agreement that ''all unions would return together,'' or an agreement between the Union and the Printers and Mailers that if they did strike, the three unions would return together and not settle separately.

(2) ''STRIKE FACTS, Twenty-One Answers to Questions You've Been Asking''

This flyer (R. Exh. 22), which was distributed about July 6, the day before the July 7 strike deadline (Tr. 1273–1277 12/4/87, 5446–5448 7/7/92), shows that it was issued by ''Chicago Newspaper Union Employees' Unity Council, Public Relations Committee—[pressman] Dennis Boyle, Chairman, 222–1000 (CFL), 733–2300 (Strike Hqs.).'' It reads in part:

> 18. Q. What support can we expect from members of other unions *not* represented at the Tribune?
>
> A: Other unions are being contacted through the Chicago Federation of Labor (whose president, Ed Brabec, is serving as spokesman for the unions) and through other labor groups and organizations.
>
> . . . .
>
> 21. Q. If there's a strike, will they probably try to ''pick off'' one union at a time?
>
> A. Perhaps. But it's been agreed among the unions: Nobody goes back until everyone goes back.

For a number of reasons, I find that the answer to question 21, that ''it's been agreed among the Unions: Nobody goes back until everyone goes back,'' reflects the position taken by CFL President Brabec and his CFL Unity Council and not an actual agreement between the Union and the Printers and Mailers—12 days before the strike—that if they did strike, they would remain on strike until all three unions reach settlements.

First, DeVito, Hagstrom, and Printers Vice President Berman all credibly denied that the three striking union ever entered into such an agreement (Tr. 5246–5247, 5253–5254 12/11/91; 5537–5538, 5540 7/7/91; 5571, 5574–5576, 5579 7/8/92). As found, none of the minutes of their membership meetings reflects any agreement that all the unions would return together. As further found, the Union gave the Company repeated assurances that it was acting independently and desired an agreement without regard to whether the other unions reached settlements.

Second, the flyer was not a printed document, issued by the Strike Unity Council itself, such as the one issued the day before, July 5, entitled ''Workers' Data Link'' (G.C. Exh. 224). That flyer, prepared by the public relations committee with the assistance of legal counsel and officers and members of the three unions, was issued as an official publication of the council, ''Chicago Newspaper Unions Employees Unity Council'' (Tr. 5546–5547, 5536–5537 7/7/92). The other printed publications in evidence (R. Exhs. 23, 100) are all issued by the council, not the public relations committee.

In contrast, the July 6 leaflet (containing the ''Nobody goes back until everyone goes back'' answer) is a typed document, issued by the committee itself. It reveals a connection with the CFL or the CFL Unity Council. The answer to question 18 states that ''Other unions are being contacted'' through CFL President Brabec, who ''is serving as spokesman for the unions'' (evidently referring to all CFL unions at the Tribune). The flyer also gives the CFL telephone number as one of the committee's numbers.

At the time, as found, the CFL Unity Council was holding weekly meetings (on Mondays) at the CFL ''to determine committee selections and strategy.'' The last of these meetings was held Friday, July 5, the day before this flyer was distributed at the plant. (Tr. 4315–4316, 4323–4324 12/3/92.)

From the circumstances and the contents of the flyer, I infer that either Brabec or the CFL Unity Council prepared or assisted in the preparation of the leaflet on July 5.

Third, I agree with the Company's argument in its brief (at 46) to the extent that it asserts that this statement (''Nobody goes back until everyone goes back'') comes from a

''common source,'' namely, CFL President Brabec (who, as found, was expressing his hope, not a reality, when he told Company President Brumback that ''all unions must have a contract before any union will settle''). I infer that the answer to question 21 was also the hope of either Brabec or the CFL Unity Council.

Regarding this flyer, Howe testified that ''it was circulated amongst employees at the [Company] and obviously we had a copy of it'' (Tr. 5599 7/8/92). When asked if Veon ever stated at the bargaining table that he understood that the three unions had an agreement that they would all return to work together, Howe answered: ''I don't recall him saying that specifically. Obviously before a strike it would have been academic.'' As found, Howe admitted that before the Union offered to return to work, he never heard anyone say there was an agreement among the unions to all return to work at the same time.

Although the Union, Printers, and Mailers distributed the flyer in preparation for the strike, I find from all the evidence and circumstances that the three unions had not reached an agreement at that time, 12 days before the July 18 strike, that they would remain on strike until all three unions settled.

c. *Miscellaneous*

In arguing that ''The Union would not settle until the other unions settled,'' the Company asserts in its brief (at 52–53) that ''It is significant that representatives of the Printers Union were at Executive House [next door to the building where the negotiations were taking place on the night of July 7–8] even though they did not have any negotiations scheduled with the Company.'' The Company appears to overlook the facts that Printers' members were scheduled to go on strike at midnight and their International vice president was meeting with the presidents of the Company and the Sun-Times, seeking negotiations.

The Company also argues (at 53) that ''Hagstrom conceded'' that ''he told the Company [on July 30] that if it had locked itself in a room with all three unions on July 7, it could have gotten an agreement.'' I infer that by making this statement, after the Company had succeeded in keeping the presses running and had withdrawn all its off-the-record concessions, Hagstrom was lamenting the lost opportunity to negotiate a more favorable agreement—instead of admitting that the Union had agreed not to reach an agreement unless the Printers and Mailers settled as well. Of course, the statement was purely speculative; joint bargaining was infeasible under the circumstances.

The Company argues in its brief (at 48) that ''admissions'' by DeVito and Paperhandlers President Roberts at a GCIU general board meeting on October 8 are further evidence that the ''Unity Council'' was ''designed to coordinate strike activity'' and ''to enable the unions to negotiate collectively with the Company.''

The minutes (R. Exh. 43 p. 3) show that DeVito ''indicated that although maximum effort had been extended by the *four-union* [emphasis added] unity council established to negotiate collectively with the publisher, no significant progress could be reported to date.'' This evidently refers to obviously lawful efforts by the three-union Strike Unity Council to join with the Paperhandlers in seeking a meeting with President Brumback through the auspices of Theodore Kheel, a well-known arbitrator (Tr. 4390, 4392 12/4/91).

In turn, Roberts complained about the lack of ''coordination among all unions involved in the Tribune prior to the decision by the graphic arts unions to strike'' (referring to the three striking unions). The minutes further read (R. Exh. 43 p. 4):

> As to the resolution of the current strike, [Roberts] noted that there was some sentiment among the various striking unions that the *graphic arts unions' unity council* [presumably the Strike Unity Council and the Paperhandlers] should be broken up and each union should attempt to resolve their respective contractual differences with the publisher independently. Noting his strong disagreement with this strategy, he reported the details of his local union's contractual terms with the Tribune prior to the strike, as opposed to what the Tribune was now offering. He felt that if coordination and unity were not maintained with all involved unions, each individual local union would face substantial difficulties in future contract settlements. [Emphasis added.]

Having an interest-arbitration provision in its contract, Roberts' Paperhandlers local did not join the strike and was not a member of the Strike Unity Council. Evidently Roberts was attempting both to show his solidarity with the three striking unions in what he called the ''graphic arts unions' unity council'' and to solicit any support he could get from the Strike Unity Council in resolving his contract problems without his resorting to interest arbitration.

Roberts did not testify. In the absence of any showing that he had personal knowledge of the relationship between the Union and the Printers and Mailers, I find that his report to the general board is not persuasive evidence that the Union and the Printers and Mailers had entered into an agreement that precluded their acting independently in negotiating their own contracts.

Finally, among other clearly unfounded positions, the Company argues in its brief (at 54–55) that the Union unlawfully proposed a picket line clause that would permit employees to honor the picket line of another union, including the Printers and Mailers, ''while claiming that none of the unions would settle until they all settled'' (referring to Brabec's May 13 statement to Brumback). Having found that the Union repeatedly gave the Company assurances that it was acting independently and desired an agreement without regard to whether the other unions reached settlements, I find that the Union lawfully proposed the picket line clause.

7. Concluding findings

As in *General Electric Co.*, 173 NLRB 253, 265 (1968), ''[T]here was *never* any conspiracy, agreement, express or implied, among the cooperating unions *that none would sign with [the Company] unless all [three] signed*. Instead . . . each was free at all times to sign with [the Company] on terms it deemed acceptable.''

The evidence is overwhelming that the Union demonstrated a sincere desire during the prestrike off-the-record discussions to compromise and avoid a strike. During the strike, as the Union contends in its brief (at 8), it ''was des-

perately trying to get a contract'' and ''get its members back to work regardless of what happened to the other unions.'' The Union repeatedly gave the Company assurances that it was acting independently and desired an agreement without regard to whether the Printers and Mailers reached settlements.

The Union engaged in lawful coordinated activities with the Printers and Mailers, setting the initial strike deadline, postponing the strike, and running the strike. It, however, exercised its independent decision making in its separate negotiations. At all times (including the five meetings at which visiting officers from a total of five CFL Unity Council unions attended as nonvoting members of the union bargaining committee), the Company and Union bargained only on their own contractual issues and never on any Printers, Mailers, or other unions' issues.

I find that the Union did not engage in unlawful coordinated or coalition bargaining. I therefore reject this second affirmative defense.

IV. THIRD DEFENSE, SURFACE BARGAINING

The Company contends in its brief (at 73) that the Union was engaged in surface bargaining, ''not sincerely negotiating to get an agreement.'' In making this contention, the Company is faced with the fact that the Union was eagerly seeking an agreement, particularly because a strike could jeopardize its members' working-life job security.

The Company first argues (at 73–75) that the Union's unlawful coordinated bargaining ''is also evidence of unlawful surface bargaining.'' Having found that the Union did not engage in unlawful coordinated or coalition bargaining, I reject this argument.

The Company argues (at 75–76) that (a) the Union ''was adamantly opposed to the Company's elimination of its use of the call room,'' preventing the Union from reaching an agreement, (b) the Union's concern about preserving the referral system ''did not have anything to do with wages, hours, and working conditions of bargaining unit employees,'' (c) ''a substantial question exists as to whether the call room is a mandatory subject of bargaining,'' and (d) ''the Union's attempt to preserve the call room was an extra-unit consideration and evidence of unlawful surface bargaining.'' These arguments obviously have no merit.

A referral system has long been held to be a mandatory subject of bargaining. *NLRB v. Houston Chapter, Associated General Contractors*, 349 F.2d 349 F.2d 449, 451–452 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966). There was no impasse on this issue. In fact, as found, the Company and Union were near agreement on the call-room issue during the prestrike off-the-record discussions, contemplating a ''complete elimination of referrals from the call room in exchange for a 'sub-line of 50 journeymen from the call room' and a backup sub-line group of 25 or 50 call-room journeymen.'' This was not surface bargaining.

Finally the Company argues in its brief (at 77–78) that the Union was engaged in unlawful surface bargaining because it ''was not bargaining solely in the best interest of the bargaining unit employees,'' but also in the interest of other union members covered by a most-favored-nation clause. ''The Union knew that it could not agree to any concessions with the Company which it had not given to the Sun-Times.''

This is a novel argument that, in the Company's judgment, it is to ''the best interest of the bargaining unit employees'' to capitulate to the Company's demands for concessions, and the Unions would be engaged in surface bargaining unless they are willing to supplant their own discretion with the Company's judgment on the best interest of the unit employees. The Company does not advance any supporting authority. I find that the argument lacks merit.

In the absence of evidence that the Company was engaged in surface bargaining, I reject this third affirmative defense.

Permanent Replacements

In my 1989 decision, *Chicago Tribune Co*., 304 NLRB 259, I found that ''after the middle of August . . . the Company began permanently replacing the striking pressmen, as decided by President Charles Brumback, Bell, and Veon.''

In its order remanding proceeding, the Board ruled (304 NLRB at 261, footnote omitted):

> In the event that the judge's resolution of issues related to the affirmative defenses does not affect his unfair labor practice findings, we find that the judge must also explicate the basis for stating that replacements hired for strikers were permanent, rather than temporary, prior to November 13, 1985. . . .
>
> Contrary to the [Company], we find that it must prove the contested fact of permanent replacement as part of its affirmative burden of proving substantial and legitimate justification for failing to hire former economic strikers upon receipt of their unconditional offer to return to work. Furthermore, the Board has held that a showing of an employer's own intent to employ replacements permanently is insufficient. ''[R]ather, the employer must show a *mutual* understanding between itself and the replacements that they are permanent'' [citing *Hansen Bros Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987)].

Vice President of Operations Bell credibly testified that during the first month of the strike, the Company was having problems hiring employees in the pressroom without telling them that they were permanent replacements. ''We had met with them a number of times . . . listening to the problems that they were having not knowing if we were going to permanently replace [strikers].'' About August 19 he personally informed Pressroom Manager Frank Malone and other division managers that ''we have made the decision to hire full time regular employees to permanently replace the striking employees.'' That ''eliminated that [hiring] problem.'' (Tr. 2325–2326, 2395–2396 12/13/88).

Malone, the Company's principal witness on the subject, convincingly gave similar testimony. Although I have not relied on any of Malone's testimony about the negotiations or pressroom overtime because he obviously gave fabricated testimony on those subjects and because ''By his demeanor on the stand he appeared willing to fabricate any testimony that might help the Company's cause,'' he did not appear to be fabricating his testimony about hiring permanent replacements.

Malone credibly testified that before August 19, ''we had difficulty . . . hiring people without giving them a permanent replacement status. So we had people questioning

whether or not they would actually stay employed there'' (Tr. 1835 12/7/88). When interviewing applicants after Bell told him on August 19 about the permanent replacement decision, he told the applicants he interviewed that if they were hired, ''they were going to be permanent replacements'' (Tr. 1837, 1847 12/7/88).

After employees were hired, they were required to attend orientation meetings (Tr. 1842 12/7/88). As far as Malone knew, in these orientation meetings he personally told all new pressmen—those hired both before and after August 19—that they were full-time regular employees, permanently replacing striking employees (Tr. 1843–1845 12/7/88, 3177 1/16/89).

Employment specialist Kevin Dansart was interviewing up to 20 or 30 applicants a day (Tr. 890 11/30/88). He credibly testified that after mid-August when Veon instructed him to inform applicants that they would be hired as permanent replacements, he began telling almost ''everybody that I would refer on to the next step in the interviewing process and anybody else who asked'' that ''they would be hired as regular full-time employees who would permanently replace the strikers'' (Tr. 893–894, 907–908 11/30/88).

I find that the Company has met its legal burden of proving that the employees it hired before November 13 to replace economic strikers were permanent replacements. Although none of the strike replacements testified, I find that the credited evidence shows a mutual understanding between the Company and the replacements that they were permanent.

CONCLUSIONS OF LAW

1. The Company's three affirmative defenses lack merit.

2. All the strike replacements hired before November 13, 1985, were permanent.

[Recommended Order omitted from publication.]